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CURRENT EVENTS.

INTERSTATE COMMERCE.—The Reagan-Cullom interstate commerce bill has, at this writing, passed both houses of congress, and when it shall have received the approval of the president, will be thelaw of the land. We have not before us the text of the bill as it finally passed, and cannot, therefore, comment upon its terms and probable operation as we may do hereafter. We allude to the subject only to express our gratification that congress has at length, and after the delay of nearly a century, exercised the power and discharged the duty prescribed by the constitution, of regulating commerce among the several States. That the exercise of this dormant power has been sadly needed by the country for years past, is a matter familiar to all persons conversant with either legal or commercial matters, and whether the new legislation has been well or ill done, the public is to be congratulated that it has been done at all. If the future shall disclose unforeseen deficiencies in the purview of the statute, or errors in its operation, they may well be cured by subsequent legislation. There is every reason, however, to believe that the measure will be received with approbation by the country at large, as well as by the commercial classes and the legal profession. It has been very carefully prepared by men of great ability and legislative experience, and thoroughly canvassed and debated in both houses of congress, and the large majorities which it received upon its final passage, especially in the popular branch of the national legislature, indicate that whatever objectionable matter may have existed in its primary draught has been eliminated.

THE LAW'S DELAY.—The New York *Nation* in its issue of the 20th inst. says: "The house of representatives passed last week the measure which had been urgently recommended by the president in his annual message, to provide for an additional judge of the United States Court in New York, but not without some remonstrance from Western members who alleged that their needs for more judges were quite as pressing as those of the commercial metropolis. If this claim is well founded, it is an argument for more judges in the West also. No disposition of the treasury surplus, or that small portion of it required to recompense the federal bench, can be made so advantageously as by employing a sufficient number of first-class men, and paying them first-class salaries, to clear the court dockets, and keep them clear. The delays of justice in the federal courts, and in State courts as well, amount in many cases to a denial of justice."

Nothing can be more discreditable to any State or government that is "at ease in its possessions," than the parsimony which denies to its citizens the speedy administration of justice. It is the primary duty and object of civil government, secured by all manner of bills of rights, constitutions, and other embodiments of organic law from *Magna Charta* down, and yet the delay of justice is, and has been for generations, a chronic grievance, not only under the federal government, but in almost every State and Territory of this union. All are without even a plausible excuse, especially the United States, which has so very much more money than it knows what to do with. Indeed, no excuse could even palliate a failure to provide adequate and sufficient courts and judges to administer justice and enforce the law, except the prevalence of "war, pestilence or famine."

THE LIBERTY OF THE PRESS — AND THE ABUSE OF IT—AGAIN.—Our recent article on this subject has elicited from a subscriber in Denver, Col., a letter, of which the following is a copy:

"Referring to your article on the liberty of the press, Vol. 24, page 1, I would say, we have a statute in Colorado as follows: 'On the trial of any action, upon the suggestion to the court by any counsel engaged therein, that the evidence to be adduced in such action will be of such a character that unnecessary publicity would operate injuriously on the public morals, it shall be the

duty of the court to exclude from attendance on said trial all persons not officers of the court or unconnected with the case in any manner.' Thus far it has prevented the publication of details of disgusting divorce trials and some other cases." — *H. M. Orahood.*

If the newspapers can be relied on, the world will probably have the Lord Colin Campbell divorce case over again, we presume, with "variations," and, in every land in which newspapers are read, the poison of its foul details will be insinuated into the minds of the young and heedless.

All this contamination, past and future, might well have been avoided if the English government had the decency and manliness embodied in this short Colorado statute.

Compared with the august and venerable majesty of the British empire, the sovereignity of Colorado is but as an infant in arms; but we know upon high authority, that wisdom sometimes proceeds from the "mouths of babes and sucklings," and it may well be that the ancient mother country might be taught something of value by one of the very youngest of her daughter Columbia's numerous brood.

The objections to excluding the public from trials of an objectionable character proceed chiefly from unreasoning timidity. That publicity in general is an essential element of judicial proceedings in all free countries is freely conceded, but, to use a homely phrase, "there is reason in all things," and the same principle that excludes from the press and the mails obscene literature should close courts of justice, whenever it becomes necessary for them to deal with shameful scandals.

NOTES OF RECENT DECISIONS.

PRIVILEGED COMMUNICATIONS — COUNSEL AND CLIENT—RIGHTS OF THE LATTER.—In the late English divorce case of Campbell v. Campbell, there was an attempt to introduce a new principle into the law of evidence. It was demanded that the notes made by the solicitor of one of the parties, setting forth the statements to him by the witnesses whom he expected to call, should be put in evidence. One of these statements was handed in, under protest, by the counsel, but he refused to produce others and was sustained by the court, which, however, seems to have laid some stress upon the fact that no notice to produce the statements and no *subpœna duces tecum* had been served.

In an earlier case,[1] Lord Blackburn treats the question of privilege, as we think, very gingerly. He says: "The principle, I think, to be derived from all the cases is that, where it appears that the documents are substantially rough notes for the case, to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the court should, as a general rule, be to refuse the inspection." Lord Brougham, however, in a still older case,[2] lays down the law on the subject, as we think, correctly, and in most explicit terms. He says: "If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client or on his account and for his benefit in the transaction of his business, or which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."

This ruling recognizes the principle which, as we conceive, underlies the whole theory of the privilege of counsel as to confidential communications, that is, that the privilege appertains not to the counsel but to the client; that it is *his* right, and in *his* interest it protects anything and everything which his counsel may have seen or heard while engaged professionally in his client's business.

[1] Tenner v. Southeastern, etc. Co., 20 W. R. 830; s. c., 7 Q. B. 771.

[2] Greenough v. Gaskill, 1 Myl. & K. 103.

WITNESS—COMPETENCY—PRIVILEGED COMMUNICATIONS—PHYSICIAN. — The New York Court of Appeals recently decided a case,[1] which, although arising under and controlled

[1] Reenhan v. Dennin, 9 N. E. Rep. 320.

by the statute law of that State, is, nevertheless, in its subject-matter and the conclusions reached, of some interest in other States. The object of the suit was to test the testamentary capacity of a testator whose (alleged) will was executed upon his death-bed, and, as intimated in the report, in a state of "collapse." To prove the physical condition of the testator and his consequent incapacity to execute a valid testament, a consulting physician was put upon the stand as a witness. It was held by the court, very properly, that the fact that he was a *consulting* physician, called in by the regular medical attendant, did not of itself exclude him from testifying, as he was lawfully in the sick chamber, but that under the New York law,[2] he, in common with all other medical men, was prohibited from disclosing any information acquired in attending a patient professionally, and that the rule applied as well to testamentary as to other cases.[3] The ruling is no doubt an accurate exposition of the statute which it expounds, but the statute itself is not a little remarkable. Sweeping as it is, however, it does not protect criminals,[4] and in a civil action for seduction it was held that the privilege conferred by the statute upon physicians would not cover a consultation as to the means of procuring an abortion.[5]

It may be remarked that, in some other States, there are statutes which in like manner exclude medical men from the witness box. That of Missouri classes physicians and surgeons among persons incompetent to testify, in the following language: "Fifth, a physician or surgeon, concerning any information he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.[6] This privilege, it will be observed, is wholly statutory; at common law, it is very well settled, a medical man had no privilege whatever to abstain from testifying to any facts touching the matter in controversy which might come to his knowledge, professionally or otherwise.[7] And why there should be such sweeping restrictions upon the competency of medical men as witnesses as those embodied in the New York and Missouri statutes is not very apparent to us. The tendency has been for years past to remove restrictions upon the competency of witnesses, in some respects, as we have recently endeavored to show, overstepping the line of justice and policy, and just why there should be a reverse movement in relation to medical testimony is by no means clear. That in issues of *devisavit vel non*, like the New York case under consideration, and in other questions affecting sanity, the testimony of the party's physician would usually be important, is obvious; and yet, it would appear that such testimony would, by these statutes, be greatly restricted, if not excluded altogether.

[2] T. Y. Code Civ. Proced. §§ 834, 836.
[3] Grattan v. Metropolitan, etc. Co., 80 N. Y. 281.
People v. Pierson, 79 N. Y. 424.
Hewitt v. Prime, 21 Wend. 79.
[4] 1 Rev. Stat. Mo. (1879) § 4017, p. 690.
[5] Duchess of Kingston's Case, 11 Harg. St. Tr. 243; s. c., 20 Howell's St. Tr. 643; Rex v. Gibbons, 1 Carr. & P. 97.

DURESS.

1. Definition.
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2. Who May Avail Himself of Duress.
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      C. Fear of Loss of Property.
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4. Criminal Cases.
   A. When Plea of Guilty Set Aside.
   B. Assault and Battery Excused.

1. *Definition.*—An assenting mind is one of the necessary elements of a binding obligation; and this, in the absence of fraud, which, like the vapor that arisese from the fabled stream that flows from the trunk of the Upas tree, kills whatever it touches, is always conclusively presumed where the

subject-matter of the contract is not illegal, unless the party contracting is a lunatic, a minor, a married woman (in some few exceptional cases), or is under *duress*.

A. Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his own free *will*.[1]

B. The old common law definition is well known. It is stated in Cruise, "If a man through a reasonable or well-founded fear of death, or mayhem, or loss of limb, is forced to execute a deed, he may afterwards avoid it. But Lord Coke says it is otherwise, where a deed is executed for fear of burning his house or taking away his goods, and the like, for these he may have satisfaction by recovery of damages."[2] It will be seen, then, under the old common law definition *duress* could not exist on account of a person's property. The test there seemed to be the fear caused by danger to his personal safety. Intimidation caused through fear of other damage was not considered sufficient to overcome the equanimity of the mind. If a man had urged that his will had been overcome by threats of a different kind from those mentioned, he would have been answered that he should have defied the threats, suffered the consequences, and have resorted to the law for satisfaction! It was also said that the *fear* must be of such an evil as to overcome the will of a man of very great courage. The law here seemed to reverse the usual order of things, and instead of protecting the weak from the power of the strong threw its mantle around the strong and left the weak and helpless without the pale of its protection. A good reason for these two unjust rules of the common law is not easily given.

C. Now the civil law was quite different and more consonant with the principles of justice and right. Domat says: "It is to be remarked that, seeing all persons have not the same courage to resist violence and threatenings, and that many are so weak and fearful that they cannot stand out against the least impression, we ought not to limit the protection of the laws against threatenings so as to restrain only such acts as are capable of overcoming persons of the greatest courage and intrepidity. But it is just, likewise, to protect the weaker and most fearful, and it is chiefly on their account that the laws punish all acts of violence and oppression."[3] He defines duress to be "all unlawful impressions which move one against his will, for fear of some great evil, to give a consent which he would not give if his liberty were free from said impression."

England, with her reverence for the "common law," adheres in a great part to the old rule,[4] and so do a few of the American courts.[5] But the vast majority of the American courts are more in accordance with the civil law and hold that the question whether a contract or agreement was entered into through fear is a question of fact for the jury to decide in each individual case from all the surrounding circumstances.

D. In the proposed civil code of New York the following definitions are given of duress and menace, which have been adopted by the civil code of California.[6] Duress consists in 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor descendant, or adopted child of such party, husband or wife. 2. Unlawful detention of the property of such person (conceded to be contrary to the weight of authority). 3. Confinement of such person, lawful in form, but fraudulently obtained or fraudulently made unjustly harassing or oppressive.

Menace consists in a threat. 1. Of such duress as is specified in the first and third subdivisions of the last section. 2. Or of the unlawful and violent injury to the person or property of any such person as is specified in the last section. 3. Or injury to the character of any such person.

2. *A.* — The question who may avail himself of the duress is sometimes quite as important as whether a duress has been exercised, and the general rule unquestionably has been that no stranger can take advantage of the duress which is a personal defense.[7]

[1] Cooley J., in Hackly v. Headly, Mich.
2 Cruise Dig. 406; 1 Black Conn. 2.

[3] Domat, pt. 1, bk. 2, tit. 18, Sec. 2.

[4] Skeate v. Beale 11, Ad. & Ell. 983; Atlee v. Backhouse, 3 M. & W. 645.

[5] Hazelrigg v. Donaldson 2 Metc. (Ky.) 445; Jones v. Bridge, 2 Sweeney 431; Bun v. Burton, 18 Ark. 233.

[6] Huscomb v. Standing, Cro. Jac. 187; Sec. 754, Cal. Code 1569.

[7] Wayne v. Sands, Freem. 351; Rolle Abr. 686, pl. A; Mantell v. Gibbs, 1 Brownl. 64; Plummer v. People, 16

B. There are several exceptions to this rule:

A husband may avoid his contract by reason of the duress to his wife and conversely,[8] and a son may avoid his contract by reason of duress to his father and the father by reason of duress to the son.[9]

It has also been held that the mayor, and commonalty may avoid a deed by reason of a duress of the mayor,[10] and that the surety on a note may avail himself of the duress of his principal,[11] however the contrary has been held in several cases;[12] and some courts have made a distinction between common law and statutory bonds.[13] A servant cannot avoid a deed made by duress to his master nor conversely;[14] neither can a bill of sale be impeached by the sellers' creditors, nor by an officer attaching in their behalf on the ground of duress.[15]

3. Duress is divided into two classes: By imprisonment of the party or such persons for whom he can avail himself of this defense, *per minas*, which is the fear of loss of life or limb, and by the more recent decisions, loss of property, or the fear of the loss of life or limb of such persons, for whom the law permits him to avail himself of this defense.

A. Duress by Imprisonment.—This kind of duress must be either an imprisonment unlawful in itself; or, if lawful, then it must be accompanied with such circumstances of unnecessary pain, privation or danger that the party is induced by them to make the contract, or, as defined by Justice Clifford, "it is where there is an arrest for an improper purpose without just cause, or when there is an arrest for a just cause but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment:"[16]

Arrest For an Improper Purpose and Without Just Cause. — The leading case perhaps where the arrest was legal in form but with an improper purpose and without probable cause, is that of Watkins v. Baird,[17] where the law is very tersely laid down by Parsons, C. J., in which it is said that it is a general rule of law that imprisonment *by order of law* is not duress, but to constitute duress by imprisonment either the imprisonment or the duress after, must be tortious and unlawful.[18] If, therefore, a man supposing he has a just cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executed a deed for his deliverance, he cannot avoid such deed by duress of imprisonment although, in fact, the plaintiff had no cause of action;[19] and although the imprisonment be lawful, yet, unless the deed be freely made, it may be avoided by duress.[20] And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner unlawfully by *covin* with the jailer, this is a duress which will avoid the deed.[21] But where the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment." In this case the plaintiff was, by false pretenses, prevailed upon to come within the jurisdiction of the court and there arrested by the defendant upon a false charge, and the deed was secured and made for the plaintiff's release.[22] In Richardson v. Duncan,[23] it was held that even though the arrest was for a just cause and under lawful authority, if done for an unlawful purpose it is duress. In Clark v. Turnbull[24] it was decided that if one who is imprisoned under a *lawful* process on an unfounded cause of action cannot avoid a deed made to procure his release on the ground of duress. In this case no malice or

Ill. 358; Spaulding v. Crawford, 27 Tex. 155; Robinson v. Gould, 11 Cush. 57; Jones v. Turner, 5 Litt. 147; Thompson v. Lockwood, 15 John. 256.

[8] Brooks v. Berryhill, 20 Ind. 97; Eadie v. Slimmon, 26 N. Y.; Green v. Grammage, 19 Ia. 46.

[9] Osborn v. Robbins, 36 N. Y. 365; McClintick v. Cummins, 3 McLean 158; Plummer v. People, 16 Ill. 358; Southern Ex. Co. v. Duffy, 48 Ga. 361.

[10] Bagley v. Clare, 2 Brownl 276; 9 Vin. Abr. 320.

[11] Stong v. Grannis, 26 Barb. 122.

[12] Huggins v. People, 39 Ill. 246; Plummer v. People, 16 Ill. 358.

[13] Thompson v. Lockwood, 15 John. 256; Fisher v. Shattuck, 17 Pick. 252; State v. Buntley, 27 Ala. 44.

[14] Rolle's Abr. 687; 2 Brownl. 276; Bac. Abr. Duress B.

[15] Lewis v. Bannister, 76 Gray, 500.

[16] Pierce v. Brown, 7 Wall. 214.

[17] 6 Mass. 570.

[18] 2 Inst. 482.

[19] 43 E. 3, 10 pl. 32.

[20] Hobb. 266; Lev. 68-69.

[21] Cro. Jac. 187, Huscomb v. Standing.

[22] See Hickman v. Swarts, S. C. Wis. 1885.

[23] 3 N. H. 508.

[24] 47 N. J. Law, 265; 54 Am. R. 157.

improper motive upon the part of the prosecuting witness was shown, nor any coercion upon the party claiming duress other than the imprisonment itself.

B. Duress per Minas.—This kind of duress comes more frequently before the courts for adjudication than duress by imprisonment, and is perhaps more difficult of definition, and under receent decisions is subject to two distinct divisions, to-wit: fear of life, liberty, and limb, and fear of loss of property. And the first may be again divided into two kinds fear of his own life, liberty or limb, or fear of the life, liberty or limb of his father, mother, son, daughter, husband or wife, or brother or sister.

To constitute duress by a threat of imprisonment for a supposed crime there must be a threat importing an illegal or wrongful imprisonment, or a resort to a criminal prosecution for an improper purpose or wrongful motive, accompanied with such circumstances as would indicate a prompt or immediate execution of the threat.[25] Mere threats of criminal prosecution is not enough, but there must be a reasonable ground for apprehension that the threat will be carried into execution, and it must also appear that the threats operated upon the mind of the party so as to overcome his will.[26]

a. In Foshaw v. Ferguson,[27] a leading case, the defendant charged the plaintiff with stealing two yearling calves and other property from him. The defendant was a larger man than the plaintiff, was loud and boisterous in his manner, said he had a warrant, and threatened to arrest the plaintiff and take him back sixty or seventy miles before a justice. The plaintiff, in settlement of the matter, gave the defendant ten head ef cattle and ten dollars in money. In an action for trover for the value of the ten head of cattle, the court held that they were obtained under duress, and the plaintiff was entitled to recover.

b. Marriage Entered Into Under Duress Is Void.—In Williard v. Williard,[28] it was shown that the complainant was, by force of arms, arrested upon the highway by the defendant's brother and, under actual duress, forced to submit to the form and ceremony of marriage; that in a few days, as soon as he could escape, he abandoned the defendant and has never lived with her as his wife, it was held that the marriage was void. But in Seyer v. Seyer,[29] it was held tbat a marriage by one under lawful arrest, for seducing a minor, under promise of marriage, is not void as obtained by duress, nor because the justice demanded excessive bail, nor because the minister who was present, and the constable who had arrested the plaintiff, and the justice who had issued the warrant, advocated its immediate performance.

The recent divorce case of Sebright v. Scott, in the English courts, illustrates what is sufficient duress to avail this kind of a contest. The evidence there showed that the defendant had at one time been engaged to the plaintiff; that it was afterwards broken off and his company again received; that the plaintiff became greatly indebted to different persons; that the defendant one day called in a carriage for the plaintiff and conveyed her to the registrar of marriages and there went through the marriage ceremony, but that they never lived together as man and wife; that at the time the plaintiff signed the register she was very much excited, and that she took off her engagement ring and threw it upon the floor, and that she remained ill from nervous prostration for a considerable period after that time. It was held, with some severe comments by the judge, that the marriage was void.

B. Fear for the Life, Liberty and Limb of Another.—It is said that, as a general rule, a stranger cannot avail himself of this plea of duress. What relation, then, must the parties bear to each other? The common law made this a relationship by blood or marriage. But it seems to me it ought not to be thus confined, and that the rule ought to be, that when it is shown that the love or affection which the party seeking to avail himself of this defense had for the other, be they related or not, caused him to do the act for fear of the life, limb or liberty of the other. We certainly know of instances where friends will make, and are liable to make, great and burdensome sacrifices, and will suffer much for one another. And if this fear for the safety

[25] Lander v. Obert, 1 Tex. Ct. Repr. 346.

[26] Harmon v. Harmon, 61 Mo. 229; Miller v. Miller, 68 Penn. St. 493.

[27] 5 Hill, 154; Coperland v. Reynolds, 12 Cen. L. J. 115, Ind. 1881.

[28] 6 Baxt. 297; 32 Am. Rep. 529.

[29] 10 Stewart, 210 N. J. Supreme Ct. 1883.

of the other will deprive the one of a free will, it certainly is duress.

a. Whether or not the injury feared must come from other persons than the person himself, upon whom it is feared the injury will be made, is a question upon which the courts are at variance. In Wright v. Remington,[30] it was shown that the wife of the plaintiff had signed the notes on account of the threat of the husband, that unless she signed them he would poison himself, and it was held that this could not constitute duress. The court says: "In turning from the statement of what is essential to constitute a defense, upon the ground of duress, to the facts in this case, it at once appears that they do not make a case within the rule laid down relating to such defense. There was no imprisonment of the woman or threat of imprisonment. There was no threatened injury to her person. The influence was that her husband threatened not to injure her, but to kill himself. * * * Here the threats were made by the husband against his own life. The maker and the objects of the threats were the same; their execution was within his own volition. The wife knew that no harm could come to him except by his own act. The present case is utterly unlike an instance of the presence of some overshadowing danger, uncontrollable by either the wife or the person endangered. There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious." This case is severely criticised, and justly so, by a celebrated legal author,[31] in which he says: "The argument that such a rule would lead to an instability in that class of contracts which would be vicious, has no weight whatever, where the jury have found as in this case, that the contract was not the act of the wife but of another, unless it is deemed advisable to give stability to contracts procured by fraud."

In Tappley v. Tappley,[32] threats of abandonment, accompanied by general abusive treatment, constitutes duress. Looking at the reverse of things, if, as is well settled, a threat of injury to goods or other property, a threat of battery or illegal imprisonment, are held sufficient to constitute duress and avoid a contract, on the ground that they have taken away the freedom of action and are calculated to overcome the mind of a person of ordinary firmness, when believed in, it would seem too clear for argument that equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself in the anomalous condition of a wife without a husband. If the degree of injury to be apprehended, and its almost remediless nature are to be taken into account, then certainly in these respects an abandonment of the wife is far in excess of a battery to the person, or a trespass upon the goods, and stands upon stronger grounds.

These two cases cannot be reconciled. The threat of the husband to kill himself and the threat to abandon the wife seem about equivalent. These are the only two cases that I have been able to find where the infliction of the injury depended upon the volition of the person, for whose safety or acts the fear was created in the minds of the person seeking the defense of duress.

b. Eadie v. Slimmon,[33] is a good illustration of where the wife executed a contract for fear of the imprisonment of her husband. It was shown that a Mr. White, the plaintiff's brother-in-law, called at Eadie's on his return from an evening's meeting, and there found the defendant and his counsel, a police officer and another man. This was about 9 P. M.; how long these persons could have been there before that time does not appear. The defendant and his counsel were in an upper room, and the officer and the man with him in a room below. The witness was requested by Mrs. Eadie to go into the drawing-room where the defendant was, who was talking very loudly and had some difficulty with her husband. The defendant insisted that Eadie should make over to him his house, and that an assignment of this policy should also be made. Eadie refused. The defendant told him that if he did not, as sure as the sun rose to-morrow he would lodge him in yonder jail; he had an officer down stairs for that purpose. The plaintiff was immediately sent for and

[30] 18 Am. Law Reg. (N. S.) 749, and note by Marshall D. Ewell; 12 Vrom. 48; 32 Am. R. 181, and note.
[31] Marshall D. Ewell, see above.
[32] 10 Minn. 448.
[33] 26 N. Y. 9.

came in. The matter was talked over. The defendant then renewed the threats to arrest Eadie if the policy was not assigned. Mrs. Eadie became much excited and appeared about to go into hysterics. In the course of the conversation the plaintiff said to the defendant: "Mr. Slimmon, surely you won't take away my husband?" he said he was sorry that he was compelled to do it. Finally the plaintiff, after about six hours of continuous altercation, yielded. "I can imagine no duress over man," says the court, "no constraint over his person or dread of personal injury, more likely to deprive him of free agency and induce him to yield to the wishes and demands of another than the duress over this woman, operating through the appeals thus addressed to her pride, her fears, her affections and her sensibilities."

c. In Jordan v. Elliott,[34] the plaintiff sued upon a judgment note obtained by him from the defendant, a widow seventy seven years of age, upon threats of prosecuting her son, to whom the plaintiff had lent sums of money amounting to $7,000, and who had become insolvent. It appeared in evidence that the plaintiff strode up and down the room with fierce gesticulation and tragical mutterings, thrust his fist in the face of the insolvent son, and vowed with uplifted hand to prosecute him unless the matter was settled, until finally the girls began to cry, and the old lady, ready through terror, as she says, to do anything to put an end to this frightful scene, and signed the note. In signing it she was so frightened that she signed her maiden name, something that she had never before done since she was married. The court, in affirming a verdict for the defendant, said: "We are free to admit that, to a man of ordinary courage, this fuss and fume of Jordan might have been regarded as a mere farce, and would have been probably productive of a consequence no more serious than a summary and unceremonious ejection of the intruder upon the premises. But to this old lady, helpless as she was, and unprepared either to encounter or deal with such sham heroics, the matter was altogether different, and the jury was justified in believing that she was much frightened, and that her will was so controlled thereby that the obligation which she signed was not her free will and voluntary act.

We are aware that neither under the common or civil law, as formerly expressed, would there have been sufficient to release Mrs. Elliott. But we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind of this country and England, that any contract produced by actual intimidation ought to be held void, whether arising from a result of merely personal infirmity, or from circumstances which might produce a like effect upon persons of ordinary firmness.

In Foley v. Greene,[35] it was *held* that a security executed by a mother to protect her son from exposure and prosecution for embezzlement, was invalid.

In Shultz v. Culbertson,[36] a note was given by a father, under threats that otherwise his son would be arrested on a criminal charge, and twelve months afterward the note was paid without suit, in a suit to recover the sum so paid, it was *held* proper to instruct the jury, that if they believed the duress was still existing when the note was paid, they should find for the plaintiff.

In Harris v. Carmody,[37] it was *held* that where a note was given by a father to the plaintiff, under threats to prosecute and imprison his son for an alleged forgery of the father's name, it might be avoided by the father on the ground of duress.

C. Duress For Fear of Loss of Property.—This is one of the innovations of modern common law, and seems to be now firmly imbedded in American jurisprudence.

In Miller v. Miller,[38] Judge Agnew said: "We concur with the counsel of the defendant in error that in civil cases the rule as to duress *per minas* has a broader application at the present day than it formerly had. Where a party has goods or property of another in his power so as to enable him to exert his control over it to the prejudice of the other, a threat to use this control may be in the nature of common law duress *per minas*, and enable the person threatened with this pernicious control to avoid a bond

[34] Supreme Court of Penn. 1882.

[35] 14 R. I. 618; 51 Am. R. 419.

[36] Wisconsin Supreme Court April, 1880.

[37] 20 Am. Law Reg. 663, Sup. Ct. Mass. 1881.

[38] 68 Penn. St. 493.

or note obtained without consideration by means of such threats."

The leading case taking this view was that of Sasportas v. Jennings[39] decided in 1795, which lays down the rule that duress of goods will avoid a written instrument if either of these essentials is wanting: 1. Ability in the person or persons imposing the duress to make the recompense; 2. A prompt and effectual method to compel satisfaction.

a. In Stephan v. Daniels,[40] it seems to have been *held* that a payment of illegal taxes, under a protest to prevent a sale of the estate, was made under duress.

b. It seems now also to be settled by the weight of the American decisions that a threat to burn one's house or other property is duress.[41]

In Cent. Bank v. Copeland,[42] threats were made to destroy the property by fire if the wife did not sign the deed, it was *held* to be duress.

But in Hackley v. Headley,[43] it was *held* that where the defendant, being indebted to the plaintiff in a considerable sum, took advantage of his financial embarrassment and refused to pay him unless he would receive in full a less sum than he claimed, and he being in pressing in need of the money received the sum and gave a receipt in full, it was *held* not to be duress of goods.

This decision is criticised with a good deal ot warmth in a note by Mr. Ewell, as being contrary to reason and justice. Judge Cooley, in rendering the opinion in this case, reviews quite a number of cases upon the subject.

c. It has been said that the fact that a note was originally obtained by duress will not be a good defense in the hands of a *bona fide* holder for value paid before it is due.[44] While this is a question that may have two sides to it, it seems to me that such a ruling is wrong. If a contract is entered into by duress, it is void *ab iuitio* and being such it could under no circumstances bind the party.[45]

4. *A.* The case of Sanders v. State[46] was an extraordinary and unusual one. The facts stated were: That in April, 1878, Josephine Sanders, the wife of the appellant, was slain with a pistol shot, at the time she was in the room alone with her husband, and he did not, and could not give any account of her death; he was then and had been for many years addicted to the use of alcoholic liquor and opium, to such an extent that he had partially become insane, he was arrested shortly after the death of his wife; his case came on for trial, his counsel and many witnesses of unquestionable veracity testify that at the time of his trial he was insane; the homicide had aroused an intense feeling in the vicinity of the county seat, where the killing was done, and the case put to trial; threats were made of lynching by a mob; counsel prepared an affidavit for delay, but feared to present it lest the mob should seize and hang the accused; the sheriff of the adjoining county came to the county seat and warned the sheriff of imminent danger from an armed mob. A jury had been impanelled and a plea of not guilty entered, but so great was the threatened danger, that counsel, to save, as they believed, their client's life, withdrew the plea of not guilty, entered a plea of guilty and a life sentence was immediately given, and the accused was at once conveyed to the State prison. The court, in a very elaborate and able opinion, held that the plea of guilty was procured by duress and vacated the judgment, and permitted the appellant to withdraw the plea of guilty, and have a new trial.

B. Latter v. Braddell[47] was another singular case in which the facts were, that the plaintiff was in the service of the defendant. From some information given by a charwoman the defendant came to the conclusion that the plaintiff was *enciente*, and told the plaintiff to pack up and leave before twelve o'clock, as she was in an improper condition. This the plaintiff denied. The defendant replied that the doctor would be there di-

[39] 1 Bay. (So. Car.) 470; Ewell's Leading Cases, 782. See Speids v. Barrett, 57 Ill. 293; Bennett v. Ford, 47 Ind. 264; Bingham v. Sessions, 14 Miss. 22.

[40] 27 O. St. 547.

[41] 1 Chit. on Cont. (11 Am. Ed.) 272; 1 Story on Cont. (5th Ed.) sec. 515; 1 Parsons on Cont. (6th Ed.) 395.

[42] 18 Ind. 305.

[43] 21 Am. Law Reg. 113; Sup. Ct. of Mich. 1882.

[44] Hogan v. Moore, 48 Ga. 157; Clark v. Peace, 41 N. H. 414.

[45] 1 Dan. on Neg. Inst. 650.

[46] 85 Ind. 318, 38 Am. R. 29.

[47] 12 Cent. L. J. 283; English Court of Appeals, 1881. See also Art. by Francis Wharton, 15 Cen. L. J. 263, on "Fear." Add. on Cont. sec. 315; 2 Kent's Com. 454; 2 Pom. on Eq. 470.

rectly, and that he would make an examination. To this the plaintiff protested, but finally went to her room and submitted to an examination, protesting and crying all the time that the examination was being made Held that there was no *duress*, and that what was done was with the consent of the plaintiff. The question of duress is a mixed question of law and fact for the jury, and the true test seems to be that if for any cause whatever, *the exercise over the will is lost*, a contract entered into while it is in that condition may be avoided for duress. As long as the will is not free it cannot be said to assent, and if assent is wanting one of the essentials of the contract ls absent. And whether or not such fear existed and was exercised over the person, as that his power over his will was lost, its free exercise unduly constrained, its power to act free and understandingly taken away, is a question for the jury, under proper instructions by the court.

WM. M. ROCKEL.

Springfield, Ohio.

ACTION FOR BREACH OF COVENANT RUNNING WITH LAND.

GILMER v. M. & M. RY. CO.

Supreme Court of Alabama.

1. *Covenant by Railroad—What Runs with Land.*—A covenant by a railroad corporation, executed in consideration of a grant of the right-of-way through plaintiff's lands, fifty feet wide on each side of the track, to erect a "flag-station" at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and, if a depot were built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice.

Appeal from Lowndes circuit court.

The opinion states the facts of the case.

SOMERVILLE, J., delivered the opinion of the court:

The action is one at law for the breach of certain covenants, entered into with the plaintiff by the Alabama & Florida Railroad Company, a body corporate, from which the defendant derived title, as assignee, to a strip of land, including the right of way through the farm of the plaintiff, situated in the county of Lowndes. In March, 1868, the appellant, who was plaintiff in the court below, conveyed to the said assignor of defendant this right of way and land, extending fifty feet on each side of the center line of the railroad track. In consideration of this grant, the said Alabama & Florida Railroad Company agreed, in substance, by a separate instrument, to establish what we may briefly denominate a flag-station on said land, at a convenient point adjacent to the plaintiff's house, where both passenger and freight trains would stop, upon the giving of proper and usual signals, for the transportation of passengers and certain kinds of produce. The plaintiff was to have the right to cultivate so much of this right of way as might not be needed for use by the railroad, and so long as such cultivation did not interfere with its wants and requirements. It was further stipulated that, in the event of a depot being erected on the premises, the sale of ardent spirits would be strictly prohibited.

It is averred that the defendant corporation derived title by succession from the original vendee and covenantor, with full knowledge of the obligations growing out of the contract.

The circuit court sustained a demurrer to the complaint, and dismissed the action on plaintiff's refusal to amend.

There is an agreement of counsel, waiving so much of the demurrer as raises any question touching the plaintiff's right to bring the action in his name, if it would lie at all, upon the facts stated. The considerati n of this point we, therefore, pretermit, assuming that the action was properly brought in the name of the plaintiff as husband, for the use of the wife.

The question for decision is, whether the covenants in question, or either of them, so run with the land as to be of binding obligation at law upon the defendant, as the assignee of the covenantor.

A covenant is said "to run with land" when the liability to perform it, on the one hand, or the right to enforce it, on the o her, passes to the vendee or other assignee of the land. Such covenants must relate to, or, as is more commonly said, "touch and concern the land," and not be merely collateral to it, in order that the assignee of the land may be charged with their benefit or burden. Spencer's Case, 1 Smith's Lead. Cas. *27. They are often called real contracts, because they are annexed or inhere to the realty as part and parcel of it, and "pass from hand to hand with the interest in the realty to which they are annexed." 1 Addison Contr. § 430. And no doubt seems to exist as to the rule, that covenants may run with incorporeal, as well as with corporeal hereditaments, as in the case of tithes and rent charges, which savor of the realty, because they are carved out of and charged on it. 2 Sugden Vend. 482. It is impossible to lay down any fixed rule by which to distinguish in all cases real covenants which run with the land, and are binding as such on heirs, devisees and assignees, from those which are merely personal, and are binding only on the covenantor and his personal representative. The subject is one full

of intricate learning, and the decisions of the courts touching it are greatly conflicting and far from satisfactory. Among those, however, which have been decided to follow the realty into the hands of an assignee, are covenants of warranty and for quiet enjoyment; covenants by tenants to pay rent, to repair, maintain fences, reside on the premises, or cultivate the demised lands in a particular manner; not to carry on a particular trade on the premises leased or purchased; not to build on adjoining premises, and many others of an analogous character. Among those adjudged to be personal and not, therefore, to touch or concern the land, are covenants made by owners of land between whom and the covenantee there is no privity of title or estate; a covenant not to hire persons of a certain description to work in a mill; or a covenant with a stranger not to permit a grist-mill to be erected on the owner's premises; a covenant by the vendor of lands not to permit marl to be sold from adjoining lands; by a lessee of a house to pay so much for every ton of wine sold in the house; or to buy all beer used by him from his lessors, or from his successors in trade. Law Real Property (Boone), § 317; 1 Addison Contr. § 435; 2 Greenl. Ev. § 240; 1 Parson's Contr. 231–233.

We cite two familiar cases only to illustrate the want of harmony in the decisions. In Taylor v. Owen, 2 Blackf. (Ind.) 301; s. c., 20 Amer. Dec. 115, the owner of a town site made a lease in which he covenanted that the lessee should have the exclusive right to sell merchandise in the town for ten years. It was held that the covenant did not run with the land so as to be binding on subsequent purchasers of other town lots from the lessor. In Norman v. Wells, 17 Wend. 136, the defendant leased a mill site to one from whom the plaintiff took by assignment, covenanting not to erect a rival mill on the same stream passing through his, the lessor's, land. This was held to be a covenant running with the land, although it was to do something off the land demised, because it affected its value. It is observed by Mr. Washburn that "such covenants, and such only, run with the land as concern the land itself, in whosoever hands it may be, and become united with and form a part of the consideration for which the land or some interest in it is parted with, between the covenantor and covenantee." 2 Wash. Real Prop. (4th ed.) 286 (*16). And this is, perhaps, a correct principle.

As the class of covenants under consideration are annexed to the realty, and pass with it to the assignee as incident to it, the rule prevails that there must be some privity of estate or of contract between the plaintiff and the defendant before a covenant relating to land can be of binding force on the assignee of the covenantor, and that usually the covenantee must have some interest in the land to which the covenantor's promise may be annexed. Otherwise, there would be nothing with which the covenant could run, or to which it could inhere as an incident. A distinction is sought to be made between the burdens and the benefits of such covenants, the assertion being made in the notes to Spencer's Case, *supra*, that "at common law the burden of covenants never ran with land, save where there was a privity of estate between the covenantee and the covenantor; or, in other words, where there was a conveyance from one to the other, while the benefit might in all cases run without such privity or conveyance." 1 Smith's Lead. Cas. *27, note. The soundness of this rule may be questioned, and there are numerous cases holding to the contrary, for, as said by Selden, J., in Van Rensselaer v. Read, 26 N. Y. 558, 574, "it has often been held that covenants, both in their benefits and their burdens, run with land, where no tenure in its strict sense exists between the parties." But the necessities of the case in hand do not require of us to discuss this particular branch of the subject. Here, however, as we shall show, there is a privity of estate between the parties litigant, and that fact brings the case within the rule that the burdens imposed on the land by the covenantor might follow it into the hands of the defendant as assignee or purchaser.

The question arises, what is the nature of that privity of estate which the law requires in order that the covenants may run with the land. It is now settled, among other rules, contrary to the earlier view of the subject, that the relationship between the parties need not be that of landlord and tenant, although this is clearly sufficient, and presents the most frequent instance of the application of the principle. There are well considered cases to be found where land has been conveyed to vendees, charged with the payment of a perpetual "rent-charge," and the purchasers or assignees from such vendees have been held liable in covenant for the annual rent, and the right to sue has been decided to enure to the assignees of the rent, and this on the principle that "the common ligament," the estate charged, unites the parties in interest as privies. Van Rensselaer v. Read, 26 N. Y. 558. But however this may be, there can be no doubt, in our opinion, as to the soundness of the principle, that this privity sufficiently exists if the covenantee retains or acquires an easement, or interest in the nature of an easement, appurtenant to the lands to which the covenant relates, and this whether such easement is acquired by grant or reservation, in either of which modes it may be created. Bronson v. Coffin, 108 Mass. 175; s. c., 11 Amer. Rep. 335. Such easement is a privilege which the owner of one tenement has a lawful right to enjoy in respect to that tenement in or over the tenement of another person, and is usually created by imposing an obligation upon the owner of the servient tenement in favor of the dominant estate, either to suffer something to be done, or to abstain from doing something on, or about the premises. 4 Kent Com. 419; Washburn on Easements, 4, 5; Robbins v. Webb, 77 Ala. 176; s. c., 63 Ala. 393; Parsons v. Johnson, 68 N. Y. 62; s. c., 23 Amer. Rep. 149.

We think, in this case, the appellant retained an interest in the land conveyed to the assignor of defendant, which was in the nature of an easement. He not only imposed a servitude upon the land by a prohibition against the sale of ardent spirits on the premises, but retained the right to cultivate it under certain conditions and circumstances, thus retaining an interest in the realty which would preserve the privity of estate in it, and to which the covenant of defendant would attach or become annexed.

A proper application of these principles leads us to the conclusion that the obligation assumed by the Alabama & Florida Railroad Company, the defendant's assignor, by which it was agreed to establish a flag-station on the road adjacent to plaintiff's house, and to permit plaintiff to cultivate the land on which the right of way was granted, imposed a burden on the land itself, and was not a mere personal covenant. It touched and concerned the land itself, and was not collateral to it, because it was to be performed on it, and affected the value of the adjacent land of the grantor, being greatly beneficial to it, and was in the nature of compensation by way of rent for the land conveyed,no other consideration having been paid therefor than that which was confessedly nominal. Spencer's Case, 1 Smith's Lead. Cas. *22, *27, and note, with cases cited. Its performance or non-performance also affected the mode of enjoyment of the granted premises, and their value or quality so as to render the title acquired by the vendee a subordinate one, and this is one of the tests by which to decide whether the covenant is inherent in the land itself. 1 Addison Contr. § 435. The covenant of the vendee, in other words, "qualified the estate which he took and attached itself to that estate." Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; s. c., 13 Amer. Rep. 556. Without consuming time to review the adjudged cases, we refer to the following authorities in support of this conclusion: Morse v. Aldrich, 19 Pick. 449; Bronson v. Coffin, 11 Amer. Rep. 335; *supra;* Wooliscroft v. Norton, 15 Wis. 198; Norman v. Wells, 17 Wend. 136; Van Rensselaer v. Read, 26 N. Y. 558, and cases cited pp. 574, 575; Trustees of Watertown v. Cowen, 4 Paige, 510; Hemingay v. Fernandez, 15 Simons, 223; Spencer's Case, *supra*, and notes; 1 Smith's Lead. Cas. *27, *et seq.;* Fulton v. Stuart, 15 Amer. Dec. 542, and notes, p. 544; Webb v. Robbins, 63 Ala., 293; s. c.,77 Ala. 176; Dorsey v.The St. Louis, etc. R. R. Co. 58 Ill. 65; Southern R. R. Co. v. Reeves. 64 Ga. 492; Lydick v. Baltimore & Ohio R. R. Co., 17 West Va. 427; Norfleet v. Cranwell, 70 N. C. 634; s. c., 16 Amer. Rep. 787.

The thing to be done in this case by the covenantor related to the realty, and being anexed to it the assignee, by accepting possession of the land, became bound by the covenant as one running with the land, without being named in the agreement. Fulton v. Stuart, *supva;* Taylor on Land. and Ten., § 437; Spencer's Case, *supra;* Morse v. Aldrich, 19 Pick. 49; 14 Add. Contr. (Morgan's ed.) § 435.

There is a class of cases unlike the present, in which courts of equity intervene for the establishment and enforcement of easements, whether created by deed or covenant, by assuming jurisdiction in the nature of that for specific performance. These we do not propose to discuss, but merely observe that equity will enforce easements or servitudes of this nature against purchasers with notice, as a burden or charge on the servient estate, although the plaintiff could not sue at law upon the covenant creating such servitude; or, in other words, even though the covenant does not, in the strict sense of the term, "run with the land." Trustees v. Lynch, 70 N. Y. 440; 26 Amer. Rep. 615; Pomeroy's Eq. Jur. §§ 692, 1395, 1342; 3 Parsons Contr. 353, note k. The averments of the complaint were sufficiently certain to recover nominal damages for the alleged breach of covenant, and this would be sufficient on demurrer. We need not, therefore, discuss the other assigments of error.

The circuit court erred in sustaining the demurrer, and the judgment must be reversed and the cause remanded.

NOTE.—Though it was a principle of common law that a chose in action was not assignable, yet an exception was allowed in the case of certain covenants in deeds relative to real estate. They were said to run with the land, so that subsequent assignees of the land could claim the benefits, or were subject to the burdens of the covenants between the original grantor and grantee. They were considered to pass with and as incident to the land.

If the covenants were not such as the law allowed to run with the land they were considered as merely personal obligations, for the breach of which only the obligor and his personal representatives were liable.[1]

In order that covenants may run with land, so that the assignees may claim the benefits or be subjected to the burdens thereof, the law has made certain requirements essential. They must be created by deed, as their name implies. Parol covenants will not run with land.[2] But the assignment of the land, even by parol, carries the covenant.[3] They must be about or affecting the land. It is not necessary that they be prepared directly on the land. It is sufficient if the thing required to be done will affect the quality, value or mode of enjoying the estate conveyed.[4] They must not be unreasonable or against the policy of the law, or too much shackle the power of disposition of the land. The grantor is not at liberty to impose on lands for all time such burdens as his fancy or whim may dictate—only such burdens will be valid as are in accordance with the rules of law.[5]

In order that the covenant may be enforced by the

1 Taylor v. Owen, 2 Blackf. 301; Hurd v. Curtis, 2 Pick. 459.

2 Wilder v. Maine C. R. R., 65 Me. 332; Lydick v. R. R. Co., 17 W. Va. 427.

3 Lincoln College Case, 3 Coke, 53; Noke v. Awder, Cro. Eliz. 373.

4 Glen v. Canby, 24 Md. 127; Sterling Hydr. Co. v. Williams, 66 Ill. 393; VanRensselaer v. Smith, 27 Barb. 104.

5 Brewer v. Marshall, 3 C. E. Green, 337; s. c., 5 C. E. Green, 537; Masury v. Southworth, 9 Ohio St. 340.

assignee, there must be a privity of estate as to the property affected between the party seeking the benefit of the covenant and the party from whom redress is claimed.[6] The privity of estate has been defined as something left in the grantor.[7] If the grantor had no estate, of course his covenant cannot run in favor of the assignee of his grantee.[8]

What constitutes a privity of estate is very difficult of definition. If a grantor conveys away all his interest in the property he cannot be said to be in privity of estate with his grantee, yet, at common law, he was considered to have a privity of estate, because there was a possibility of a reverter of the land to him by escheat.[9] This privity of estate was destroyed by the act of *quia emptore* (A. D. 1290), which abolished this right of escheat. In some States this act is not recognized, while in others this matter is regulated by statute.[10]

A grant of an incorporeal hereditament arising from land, or even an agreement that it shall exist or be created, is considered to give a privity of estate, for covenants are recognized as running with incorporeal, as well as corporeal hereditaments.[11]

Covenants for title and for further assurance, being for the benefit of the land, are usually held to run with the land for the benefit of assignees, even when the original grant was a fee.[12] They have been considered as an exception to the rule that the grantor, having parted with his interest in the land, could have no privity with its subsequent owners.[13] If the statute of *quia emptores* is not in force, such covenants need not be considered an exception to the rule, because, as shown elsewhere, there still remains a privity of estate at common law between the grantor and grantee. Courts have gone so far as to say that the burden of a covenant never ran with the land, except where the relation of landlord and tenant existed between the parties.[14] But various covenants are often sustained as grants or easements. So it has been held that a covenant to pay rent was in the nature of a grant, and, therefore, ran with the land as the grant of an interest therein.[15]

But it is well established that where a tenure is created between the parties, the covenants of the grantee will bind his assignees.[16] A reservation of a privilege or interest in the land in the nature of an easement or servitude for the benefit of the dominant estate is also recognized as creating a privity of estate.[17] Where the covenants relate to things in *esse*, and are such as the law construes to run with the land, the assignee is bound by them, though he is not named in the deed. When they relate to things not in *esse*, and the assignee is not named, it becomes a question to be determined by the construction of the whole deed whether the assignee is bound. If the covenants are such as the law calls collateral, and does not consider to run with the land, the assignee is not bound, even though the deed expressly says he shall be bound.[18]

If the estate comes to an end the privity of estate ceases, and the assignee cannot enforce the covenant.[19] This refers to an expiration of the estate by its own limitation, and not to a dispossession by others.[20] So the grantor must have been in actual or constructive seizin at the time of the grant or the covenant will not run, since there can be no privity of estate.[21] Where the possession of land without the title, though it was taken and held under claim of right, is not considered to be an estate in the land, this rule has worked great hardship. An assignee who was placed in possession and was subsequently ejected by a superior title has been denied any redress against the prior grantor, upon whose covenants alone he may have relied.[22] In some States such possession, since it may ripen into a perfect title, is regarded as an estate in lands.[23] In order that the assignee may claim the benefit of a prior covenant, the estate assigned to him must be identical in quantity of interest with that in the original grant, but it need not be the same in extent. A part of the property may be assigned to one person and another part to another person, but the whole interest of the assignor in a part must be assigned, if the assignee is to obtain the benefit of, or be subject to, the covenants of prior parties.[24]

Who Shall Sue for Breaches of Covenants.—If the breach of the covenant occurs prior to the assignment he assignor must sue;[25] if it occurs subsequently, the assignee is the proper party to sue,[26] unless the assignor is bound by contract to indemnify the assignee, in which case the assignor can sue, though it is generally held he must have paid his assignee the damages sustained before he can recover them in such suit.[27] When the covenants are broken as soon as they are made, such as for seizen, against incumbrances, etc., a subsequent assignee cannot sue on them. In England and in some of the States, they are not disposed to regard such breaches as more than nominal, and consider the actual breach as occurring when the loss is sustained, and they allow the assignee in possession at

6 Hurd v. Curtis, *supra.*

7 Keppell v. Bailey, 2 M. & K. 517.

8 Bartholomew v. Candee, 14 Pick. 167; Slater v. Rawson, 1 Metc. 450.

9 VanRensselaer v. Smith, *supra;* Ingersol v. Sergent, 1 Whart. 337.

10 VanRensselaer v. Smith, *supra;* Wallace v. Harmstad, 44 Penn. St. 492.

11 Martyn v. Williams, 1 H. & N. 817; Morse v. Aldrich, 19 Pick. 449; Fitch v. Johnson, 104 Ill. 111.

12 Martin v. Baker, 5 Blackf. 232; Suydam v. Jones, 10 Wend. 180; Dickinson v. Moomes, 8 Grat. 353; Lewis v. Cook, 13 Ired. 193; Sterling v. Hydr. Co. v. Williams, 66 Ill. 393.

13 Hurd v. Curtis, *supra.*

14 Brewer v. Marshall, *supra.*

15 Brewer v. Marshall, *supra.*

16 Graves v. Porter, 11 Barb. 592; Torrey v. Wallis, 3 Cush. 442.

17 Woodruff v. Trenton Water Power Co., 2 Stock. Ch. 489; Morse v. Aldrich, 19 Pick. 449; Savage v. Mason, 3 Cush. 500; Trustees of Col. College v. Lynch, 70 N. Y. 440; Hazlett v. Sinclair, 76 Ind. 488; Fitch v. Johnson, *supra;* O'Neil v. Holbrook, 12 Mass. 102.

18 Brewer v. Marshall, *supra;* Masury v. Southworth, *supra.*

19 Seymour's Case, 10 Coke, 95.

20 Lewis v. Cook, 13 Ired. 193.

21 Slater v. Rawson, 1 Metc. 450; Devore v. Sunderland, 17 Ohio, 52.

22 Nesbit v. Brown, 1 Dev. Eq. 30; Randolph v. Kinney, 3 Rand. 394; Martin v. Gordon, 24 Ga. 533.

23 Slater v. Rawson, 6 Metc. 439; Bedloe's Es. v. Wadsworth, 21 Wend. 120; Kirkendall v. Mitchell, 3 McLean, 144; Collier v. Gamble, 19 Mo. 472; Fowler v. Poling, 2 Barb. 300; s. c., 6 Barb. 166.

24 Mayhew v. Hardesty, 8 Md. 479; Merceron v. Dowson, 5 B. & C. 479; Stevenson v. Lambard, 2 East. 575; McFarlan v. Watson, 3 Comst. 286.

25 Clark v. Swift, 3 Metc. 390; Mitchell v. Warner, 5 Conn. 497; Brown v. Wilson, 12 B. Mon. 100; Wilson v. Peele, 78 Ind. 384.

26 Claunch v. Allen, 12 Ala. 159; Redmire v. Brown, 10 Ga. 301.

27 Wheeler v. Sohier, 3 Cush. 219; Claunch v. Allen, 12 Ala. 159; Chase v. Weston, 12 N. H. 413.

the time of the loss to sue on the covenant.[28] They often look upon the covenants as intended to be covenants of indemnity.[29]

There are cases where courts of equity have sustained suits in favor of assignees to enforce covenants which did not run with the land, and which the assignees could not enforce at law. It is impossible to lay down any rule on this subject. In one case it was said, that where equity has enforced agreements where parties were not bound by their covenants, it was done to prevent a party having knowledge of the just rights of another from defeating those rights.[30] Where equity enforced parol agreements in favor of an assignee, it was claimed that the agreements were of such a nature as would have run with the land if they had been under seal.[31]

If, however, circumstances have changed, so that the objects sought can no longer be attained, or injury would result from enforcing the covenant, equity will use its discretion and will not interfere.[32]

Since the liability of the assignee is founded on the privity of estate, it may be terminated at any time by a transfer of the estate assigned, although the transfer be made to a pauper and for the express purpose of evading the obligation.[33]

S. S. MERRILL.

[28] Martin v. Baker, *supra;* Kingdon v. Nottle, 1 M. & S. 355; s. c., 4 M. & S. 53; Collier v. Gamble, *supra.*

[29] Dickson v. Desire, 23 Mo. 151.

[30] Barron v. Richard, 8 Paige, 351; Bronwer v. Jones, 23 Barb. 153; Whartman v. Gibson, 9 Sim. 196; Brewer v. Marshall, 4 C. E. Green, 537; Nesbit v. Brown, 1 Dev. Eq. 30.

[31] Wilder v. Maine C. R. R., *supra;* Lydick v. R. R. Co., *supra.*

[32] Trustees Col. College v. Thacher, 87 N. Y. 311; Bedford v. Trustees Brit. Mus., 2 M. & K. 552; Parker v. Nightingale, 6 Allen, 341.

[33] Fagg v. Dobie, 3 Younge & C. 96; Kimpton v. Walker, 9 Vt. 191; Armstrong v. Wheeler, 9 Cow. 88.

CONFLICT OF LAWS — FOREIGN DISCHARGE IN BANKRUPTCY — FOREIGN JURISDICTION — BILL OF EXCHANGE — LIABILITY OF DRAWER.

PHELPS v. BOLAND.

Court of Appeals of New York, November 23, 1886.

1. *Bankruptcy — Proving Demand — Effect of.* — The holder of an accepted foreign bill of exchange, who, after the protest of the bill for non-payment and the bankruptcy (in England) of the acceptor proves his debt in the bankruptcy proceedings in that country, and accepted a composition dividend, thereby submitted himself and his demand to the foreign law, and his claim was extinguished by the subsequent discharge of the bankrupt in England.

2. *Release of Drawer.* — The holder of the bill of exchange, by thus submitting himself and his claim to the foreign jurisdiction, released the drawer of the bill from liability upon it to him, the drawer not having concurred in or assented to the proving of the demand in the English court of bankruptcy.

FINCH, J., delivered the opinion of the court:

The defendant, a citizen of this country, drew a bill of exchange to his own order, at sixty days' sight, upon Johnston & Co., who were English merchants, residing in Liverpool. The defendants sold it to the plaintiffs, who were American bankers, residing in New York. The bill was duly accepted by Johnston & Co., payable in London, who, thereby, as to the plaintiffs, became the principal debtors, the drawer being contingently liable upon their default, and holding the position of a surety for the payment of their debt. The bill was protested for non-payment at its maturity, Johnston & Co. having failed, and, being unable to meet their liabilities, and the holders now sue the drawer to recover its amount. The latter defends upon the ground that, as surety, he was entitled, upon payment of the bill, to be subrogated to the rights of the holder, and that the latter had so destroyed or materially impaired those rights as to have lost all remedy against the drawer. The fact relied on as to the cause and basis of this result is that the acceptors were discharged in bankruptcy, upon a compromise, by the English courts; and that the plaintiffs, who were originally not parties to the proceeding, became so afterwards, voluntarily, and proved their claim, and accepted the composition decreed, whereby the judgment became binding upon them in this country as well as in England, and so the acceptor was wholly discharged, and right of subrogation as surety rendered valueless.

The answer made to this contention is that the foreign discharge in bankruptcy was operative against the holders in this country, even although they had never become parties to the proceeding, and so the release of the acceptor flowed from no act of theirs, and consequently they had not invaded or affected the drawer's rights.

The authority pressed upon our attention, and which we are asked to follow, is that of May v. Breed, 7 Cush. 15. The deserved reputation of the court, and the great ability of its reasoning, may well make us hesitate and reflect before adopting a contrary conclusion; but, deeming the question substantially settled, both in our own State and in the federal courts adversely to the opinion cited, we feel it our duty to acquiesce in that result.

Two propositions are conceded on all sides. That the title of a foreign assignee, conferred by the foreign bankrupt law, may be asserted in our courts, but cannot operate or be effectual as against our own citizens, pursuing their remedies as creditors against the bankrupt or his property, within our jurisdiction, or when the recognition of such title is against our public policy, is conceded in May v. Breed, and has quite recently been decided by us (*In re* Waite, 99 N. Y. 433; s. c., 2 N. E. Rep. 440), and that, as between the States of the Union, a discharge by the law of one will not bar the right of a creditor who is a citizen of another, and not a party to the proceed-

ing, is equally well settled by a substantial concurrence of authority. The argument of the learned chief justice in the Massachusetts case is largely occupied with an effort to show that these two propositions do not decide the case of a discharge by the foreign court of a debt or obligation contracted under the laws of its jurisdiction, and to be there paid and discharged. It is asserted that the cases between citizens of different States in our own country rest, not upon doctrines of international law, but upon provisions of the federal constitution, and governmental relations peculiar to our national organization.

The most important and authoritative of these is Ogden v. Saunders, 12 Wheat. 217; and it is subjected to the double criticism that it did not in all respects reflect the opinion of the court, and that it decided no question of international law. The first suggestion was fully and finally answered in Baldwin v. Hale, 1 Wall. 223, where the authority assailed was vindicated, and its doctrine expressly ratified and affirmed. The second suggestion seems to us not sustained by a careful reading of the case. The question before the court was stated to be "whether a discharge of a debtor under a State insolvent law would be valid against a creditor and citizen of another State who has never voluntarily subjected himself to the State laws otherwise than by the origin of his contract," and was argued in two forms: *First*, as a question of international law; and, *second*, under the federal constitution. Upon the first branch of the argument the English rule was admitted to be that "the assignment of the bankrupt's effects under a law of the country of the contract should carry the interest in his debts, wherever his debtor may reside;" and then it was declared to be "perfectly clear that in the United States a different doctrine has been established; and, since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether." At a later stage of the opinion attention is called to the circumstance that the discharge is always and necessarily an adjudication of a court, and depends wholly upon the operative force of that adjudication; and that neither comity nor justice requires that we shall hold one of our own citizens bound by a judgment of a foreign court to which he was not a party, could not be compelled to be a party, and of which he might have had no notice.

I have less hesitancy in thus asserting the error of May v. Breed in construing the decision of the federal court as standing outside of international law, and so not authority in a case like this, because I observe that Mr. Redfield, in editing a new edition of Story on the Conflict of Laws, has deemed it necessary to criticize his author's assertion of the same error (section 241 *a*), and more especially because the supreme court itself, in the later case of Baldwin v. Hale, *supra*, put its decision mainly upon a ground not peculiar to our federal relations, but upon the effect of a foreign judgment. This last case also, referring to the Massachusetts doctrine—"that, if the contract was to be performed in the State where the discharge was obtained, it was a good defense to an action on the contract, although the plaintiff was a citizen of another State, and had not in any manner become a party to the proceedings"—expressly repudiated the conclusion; saying that, "irrespective of authority, it would be difficult, if not impossible, to sanction that doctrine."

In our own State two cases have been decided in substantial accord with the ruling of the federal court. Gardner v. Oliver Lee & Co.'s Bank, 11 Barb. 558; *In re* Waite, *supra*. The latter case stated the general rule without grafting upon it any exception founded upon the origin of the contract. We are content to follow these authorities, without entering into the wide and difficult discussion in which they culminated. It follows, therefore, in the present case, that the foreign discharge would have been, in and of itself, no defense to the American holder of the bill. If property of the bankrupt should be found in our jurisdiction, the plaintiffs were at liberty to proceed against it by attachment, and collect their debt out of such property; and the foreign bankruptcy proceedings would neither prevent nor stand in the way, for the sufficient reason that their only force in our jurisdiction comes from our consent, and we have chosen thus to limit that consent. This right remaining to the plaintiffs was a valuable right. It charged with the payment of the protested bill any present or future acquisitions of the acceptors which might come into our jurisdiction, and might result in the collection of the whole debt, or a compromise settlement, induced by the desire or interest of the debtors to have access to our markets and freedom to resume their business among us. To that right, thus valuable and material, it was the privilege of the surety to succeed by way of subrogation, whenever he should pay the debt, and the plaintiffs could not deprive him of it, or impair and destroy it, except at the peril of releasing him from his liability. Just that was what the plaintiffs did. Tempted by the compromise offered, they sought to obtain the defendant's consent to its acceptance by him. That consent he withheld, but they, acting upon their own conceptions of what was most for their interest, voluntarily submitted themselves, and their rights as creditors, to the foreign jurisdiction, proved their debt, and accepted the compromise decreed. The condition of the dividend was a release of the debtor. They could not take the compromise and avoid the condition, and so, by their act, they discharged the acceptors entirely and everywhere. That such is the effect of their voluntary submission to the foreign jurisdiction is inevitable on principle, and has been often decided. Gardner v. Oliver Lee & Co.'s Bank, *supra*; Clay v. Smith,

3 Pet. 411. The unavoidable consequence follows. The creditor having, by his own voluntary act, released the debtor from all remaining liability, his surety is discharged. The courts below so held, and we think correctly.

But another suggestion has arisen among us, original with the court, and not at all urged in the brief of counsel, prepared with great thoroughness and ability. That suggestion is that Boland consented to the acceptance of the dividend by plaintiffs, and so lost the right to complain; and the evidence on which this is founded is said to exist in two letters which passed between the parties. It is not pretended that plaintiffs' letter asks Boland's consent to their acceptance of the dividend, or that he, in terms, gave that consent, but such consent, not directly asked or given, is sought to be inferred from what was written. The letters are but the declarations of the parties bearing on the issue, and none the less so because they happen to be in writing. The proper inferences to be drawn from them were questions of fact more or less affected by the other evidence in the case. Whether, from the language used, Boland meant to give his consent and waive his rights, or plaintiffs understood him to consent and acted upon that understanding, or without it, were certainly inquiries for the jury and not for the court. But neither party asked to go to the jury upon any question of fact, and each, by asking judgment in his own favor waived any possible question of fact, and conceded that only questions of law were involved. Were this otherwise, the result would not be changed. As I have said, plaintiffs did not ask Boland's consent to their proving their own claim. On the contrary, they asked him to prove his, in order that they might not be compelled to prove theirs. The plain meaning was: We ask you to prove yours. If you decline, we shall prove ours, at all events. To this request, the only one made, Boland returns a refusal. That it is politely said in the phrase addressed to the counsel, "I would much prefer that your clients adopt some other course for securing to themselves dividends," means only, in connection with their explicit avowal, "do it yourselves, if you choose to do it at all;" and then, as if fearing the very misconstruction now suggested, he adds: "I think, upon the whole, it may be better to leave the matter as it stands at present, rather than complicate it by assuming to be bailee of any funds they may claim as theirs. I do not aspire to the position." Unquestionably his meaning is, "It is best that neither of us touch this dividend, and I, at least, refuse." Language must be tortured to make this a consent, and a waiver of the surety's rights.

The judgment should be affirmed, with costs.

NOTE.—The question in this case, as we understand it, was whether the act of the holder of the bill in participating in the bankruptcy proceedings in England impaired any right of the drawer, upon his paying the bill, to recourse upon the English acceptor. Besides the Massachusetts case,[1] which the court declined to follow, there are other cases which support the doctrine that, in the language of Isham, J.,[2] "at common law, when a note is executed and payable in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the note, wherever the creditor may be domiciled, or wherever the note may be prosecuted." It may be noted, however, that in that case the note was made in Canada, was payable generally, and, therefore, to be regarded as a Canadian contract.[3] If, however, a bill is made in one place and accepted there, payable in another place, the law of the place where the bill is payable will govern.[4] *A fortiori*, it would seem that, if a bill, as in the principal case, is made in one country, accepted and payable in another, it will be governed by the law of the latter country. Upon this theory the discharge in bankruptcy of the acceptor would extinguish the debt and relieve the acceptor from all liability to the drawer, whether the payee participated in the bankruptcy proceedings or not, and if so, it is a little hard to see how the action of the plaintiff, in accepting the dividend, impaired the remedy of the drawer of the bill. That was lost, not by the act of the plaintiff, but by the operation of the English law, to which he had, in one sense, submitted himself in the first instance by drawing a bill payable in that country, and accepted there by a drawee resident thereof.

It would seem, however, that, by becoming a party to the bankruptcy proceedings in England, and accepting the dividend declared, the plaintiff surrendered all future recourse upon the acceptor, and discharged him entirely, and this doctrine is sustained by a ruling in a like case of the Supreme Court of the United States,[5] in which the facts were that the plaintiff, having accepted a dividend under the insolvency laws of Louisiana, of which State he was not a citizen, thereby precluded himself from any further remedy against his debtor as fully as if he had been a citizen of Louisiana and in all respects subject to its laws.

The English rule on this subject is, that a discharge in bankruptcy, or under equivalent insolvency laws, is a perfect and absolute extinguishment of all the liabilities of the bankrupt, and is equally operative everywhere. The American courts have generally held, in construing the insolvent systems of the different States, that laws of that character have no extra-territorial force, and do not operate a discharge of the debtor as against a creditor resident in another State, unless by his own act such creditor has placed himself or his demand within the insolvent or bankrupt courts, or subjected himself or his claim to the operation of the insolvent or bankrupt laws.

R. S. T.

1 May v. Breed, 7 Cush. 15.
2 Peck v. Hibbard, 26 Vt. 702.
3 Story Confl. of Laws (8th ed.), § 317, p. 446.
4 Cooper v. Earl of Waldegrave, 8 Beav. 282.
5 Clay v. Smith, 3 Pet. 411.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—*Venue—Fraud—Sale—Texas Statute.*—When an action is brought in one county in Texas against a resident of another county, the district court of the county where the action has jurisdiction of the subject-matter of the action when the petition sets up fraudulent representations going to vitiate an oral sale of lands and goods situated in the county where the action is brought, and where the sale was made, and asking to have the sale rescinded and the purchase money returned, and the defendant waives his right to object to the jurisdiction on the ground that the court has no jurisdiction of his person by going to trial; and it is error to dismiss the action after the evidence was in for lack of jurisdiction.—*Watson v. Baker*, S. C. Texas, Nov. 12, 1886; 2 S. W. Rep. 375.

2. ALTERATION OF INSTRUMENTS — *Promissory Notes—Condition on Stub—Severance and Transfer—Bona Fide Purchaser.*—Where a condition affecting a promissory note was written on a stub to which the note was attached, in a book of blank notes, and the payee afterwards tore the note off, and negotiated it in that form, before maturity, to a purchaser for value, without notice of the condition, *held*, that the latter could not recover on the note irrespective of the condition.—*Stephens v. Davis*, S. C. Tenn., Dec. 9, 1886; 2 S. W. Rep. 382.

3. ASSUMPSIT—*Money Paid to Remove Incumbrance—Mortgage—Foreclosure—Redemption—Estoppel by Judgment — Subsequent Transactions.* — A decree enforcing an agreement extending the time for redemption or repurchase of property sold upon foreclosure, and ordering a reconveyanee by defendant, who was the successor to the interest of the purchaser at the foreclosure sale, upon payment of the sum found due to him, provided for the payment of part of such sum by the assumption by the redemptioner of a mortgage which had been placed upon the property by defendant. As to another mortgage also placed upon it by him, no provision was made, it being supposed that the latter mortgage had been paid. *Held*, that the redemptioner, upon being obliged to pay off the latter mortgage, could recover the amount so paid from the one from whom he had redeemed, and that the decree did not estop him from claiming it. The fact that the redemptioner afterwards realized, out of a sale of the property, more than enough to reimburse him for all sums paid thereon, creates no rights in defendant.—*Weiss v. Guerinean*, S. C. Ind., Dec. 7, 1886; 9 N. E. Rep. 399.

4. ATTACHMENT—*Damages—Sheriff — Assignment —Trust — Equity.* — In an action for damages brought against a sheriff for neglect and failure to levy upon certain goods, under a writ of attachment issued subsequent to the execution by the attachment debtor of an assignment of the goods in trust, it is the duty of the sheriff, after ten days has elapsed since the making of the assignment, the period allowed by law for the assignee to file his bond, to levy upon the property. Neglecting to do so, it was incumbent on him to show that the property directed to be levied upon was not the property of the defendant in the attachment suit, and if he relied upon the assignment as a transfer of the title, it was incumbent on him to show that a bond had been filed by the assignee, or that creditors had intervened upon the chancery side of the court to enforce the assignment. A creditor of the assignors, after the time given by the statute to file the bond has expired, has two remedies. He may proceed, upon the equity side of the court, to have the trust carried out through the interventions of a receiver and the supervisory powers of a court of chancery; or he may, if no other creditor invokes the aid of chancery, proceed to enforce his claim against the property of his debtor by levy of attachment or execution, as if the attempted assignment had not been made.—*Beard v. Clippert*, S. C. Mich., Nov. 17, 1886; 6 West. Rep. 607.

———*Rights of Claimant—Interpleader—Instructions—Possession—In Charge of Carrier.*—In an attachment suit in which an interplea is filed alleging that interpleader is the owner of the chattels attached, instructions to the jury to the effect that if they found the chattels were *bona fide* the property of the wife of the debtor defendant, who, through defendant or otherwise, had delivered them to said interpleader under an agreement that he should sell them, and out of the proceeds deduct an account he had against such wife or defendant, and pay the balance to her agent, the defendant, or, if they believed such wife was the owner in good faith of the chattels, and, through her agent or otherwise, turned them over to such interpleader, or consented that he should hold them as his property in trust for her, he to account for the proceeds, although he gave no value for the chattels, they should find a verdict for such interpleader, are correct, as, between himself and parties to the suit, such interpleader is the owner, and it was proper for him so to allege in his pleadings, and therefore there is no departure from the issue as to his ownership. The possession of goods by a carrier for purposes of carriage does not deprive the owner of the goods of his possession, or of the benefit of that presumption of ownership arising from possession.—*Wear v. Sanger*, S. C. Mo., Dec. 20, 1886; 2 S. W. Rep. 307.

6. ATTORNEY AND CLIENT—*Purchase by Former of Latter's Land at Tax Sale—Attorney Must Show His Title to be Marketable Before he Can Compel Payment by his Vendee.*—An attorney at law can not buy in, at a treasurer's tax sale, and hold as

his own, the land of his client. An attorney at law purchased at a treasurer's tax sale property which had belonged to his clients, and sold the same to a third person. The latter refused to accept the property on the ground that the title was not marketable. *Held*, that the question whether or not the relation of attorney and client existed at the time of the treasurer's sale was not one that the purchaser from the attorney could be called upon to solve, and that until it was solved, and that in favor of his vendor's title, he might refuse payment.—*Elliott v. Tyler*, S. C. Penn., Nov. 1, 1886, 6 Atl. Rep. 917.

7. CONTRACT—*Consideration—Fire Insurance.*—As a general rule, where the consideration is entire and single, the contract must be held to be entire, although the subject may consist of many distinct and independent items. For an entire consideration plaintiff was insured against loss by fire to the amount of $2,400—$1,000 on each of two connected buildings—and $400 on a dwelling in the rear of said buildings. *Held*, that the vacancy of the house in the rear avoided the policy as to the other buildings also.—*Kelly v. Humboldt, etc. Co.*, S. C. Penn., Jan. 3, 1887; 17 Pitts. (N. S.) L. J. 234.

8. CRIMINAL LAW—*Variance—Amendment—Indictment—Time—Power of Court to Amend—Exceptions—Signing and Filing—Art. 1363, Rev. St. Tex. — Larceny — Declarations of Defendant's Father.*—It is beyond the power of the court to correct an indictment which alleges the offense to have been committed on or about a date named, when, on the trial, such offense is proved to have been committed at a date subsequent to the finding of the indictment, although the date is merely a clerical mistake, and a verdict of guilty, under such circumstances will be set aside. Where, in the trial of a criminal case, bills of exception were presented to the judge within ten days after the conclusion of the trial, which were filed by him during the term of the court, but were not filed within ten days, it was a sufficient compliance with article 1363, Rev. St. Tex. In the trial of an indictment for larceny, the declarations of the defendant's father in relation to the stolen goods, if made in the presence and hearing of the defendant, are admissions as original testimony, as much as if they had been made by the defendant himself.—*Clement v. State*, Ct. App. Tex., Oct. 16, 1886; 2 S. W. Rep. 379.

9. DEED—*Delivery—Presumption—Misnomer.* — In the absence of any evidence or circumstances to the contrary, the production of a deed by the grantee is *prima facie* evidence of its delivery. No presumption of delivery arises where a deed running to Mercy A. Andrews is produced by Melissa A. Andrews, her deceased husband being the grantor.—*Andrews v. Dyer*, S. C. Me., Nov. 29, 1886; 3 N. Eng. Rep. 228.

10. DEVISE—*Charge on Land—Equitable Title—Merger.*—By devise of land "provided" devisee pays certain legacies a charge on the land devised is created. Where a vendor buys back from the devisee, who was executor of his vendee, the equitable title of land which he had agreed to convey, the legal and equitable title become merged and he takes subject to charges created thereon by his vendee.—*Phillips' Appeal*, S. C. Penn., Jan. 3, 1887: 11 Pitts. L. J. (N. S.) 240.

11. DRAINS AND SEWERS—*Action to Enforce Assessment — Void Proceedings — Pleading — Judgment—Res Adjudicata—Irregularity in Proceedings.*—Where proceedings for the establishment of a ditch are absolutely void, under the law in force at the time they were had, a pleading based on such proceedings cannot be rendered good by an averment that they were had under the provisions of an act which had been repealed eighteen months before they were begun. A former adjudication will constitute a bar to any other suit between the parties for the same cause of action, where it is not absolutely void, although errors and irregularities may be found therein.—*Phillips v. Lewis*, S. C. Ind., Dec. 10, 1886; 9 N. E. Rep. 395.

12. EJECTMENT — *Defense — Sale Under Deed of Trust — Presumption of Payment — Evidence—Statute of Limitations—Mortgage—Note Barred—Adverse Possession—Partial Payments.*—In an action of ejectment, where the defendant claims title under a sale by a trustee under a deed of trust, the deed of trust is admissible in evidence, even though it show that the debt was more than ten years past due at the date of the trustee's sale; the presumption of payment from lapse of time being rebuttable by facts and circumstances, and the question of payment being one, therefore, which could not be determined until the defendant's evidence was all before the court. In Missouri, even though the mortgage note be barred by the statute of limitations, the right of the mortgagee to foreclose, or to recover possession, will not be barred, except there be ten years' adverse possession on the part of the mortgagor or his grantees, and their possession will not be adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties.—*Lewis v. Schwenn*, S. C. Mo., Dec. 6, 1886; 2 S. W. Rep. 391.

13. ——— *Evidence — Unrecorded Deed — Admissibility—Notice—Statute of Limitations—Mistake in Boundary — Adverse Possession — Excessive Judgment — Remittitur.* — An unrecorded deed being binding as between parties and all persons having notice of it, it is admissible in evidence in an action between adjoining proprietors, where the title of the opposing party calls for it, that being sufficient notice. Where the boundary between adjoining properties is in dispute, possession up to what was erroneously supposed to be the true line, with no intention to claim beyond the true line, does not constitute adverse possession. In an action of ejectment, where the jury find for the plaintiff in excess of the land to which he is legally entitled, and for damages, it is competent for the plaintiff to offer to remit the excess; and, where this is done on appeal, the supreme court will affirm the judgment as to the residue.—*Keen v. Schnedler*, S. C. Mo., Dec. 6, 1886; 2 S. W. Rep. 312.

14. EMINENT DOMAIN—*Jury Trial—Condemnation Proceedings.*—In a proceeding to condemn land for railroad purposes, each party has a right to have the matter involved tried by a jury, and, should the court deny that right and proceed to judgment, the judgment rendered would be erro-

neous; but where the court has jurisdiction both of the subject-matter and of the parties, the general rule is that the judgment, although erroneous, is valid until reversed on appeal or writ of error. The right of trial by jury, conferred by the constitution, is a mere privilege which, in a civil proceeding, may be waived or dispensed with by the parties; and this principle applies to proceedings for the condemnation of land by a railroad company, the amount of damages to be awarded affecting only the owner of the land and the railroad company.—*Chicago, etc. Co. v. Hock*, S. C. Ill., Nov. 13, 1886; 6 West. Rep. 697.

15. EVIDENCE.—In an action of ejeectment, upon the question of the minority of a grantor of the premises in controversy, where the verdict of the jury was given in the face of positive proofs of the witness who testified to her minority at the date of her conveyance, and is consistent with none of the other testimony on either side, it should not be allowed to stand, but a new trial should be awarded.—*Corbett v. Spencer*, S. C. Mich., Nov. 17, 1886; 6 West. Rep. 634.

16. GAMING—*Contract—Definition—Stock-Jobbing—Lender Cannot Recover Money Loaned for Stock-Jobbing—Knowledge of Lender—Confederation.*—Anything which induces men to lend their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community. All gambling is immoral, and a wagering or gambling agreement, being in violation of the law, and in the nature of a public wrong, has no legal effect. Money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back. It being unlawful for one man to pay, it cannot be lawful for another to furnish him with the means of paying. The mere fact that a lender of money knew that it was to be used for gambling in oil is not sufficient to defeat a recovery, unless he confederated with the borrower for its unlawful use.—*Waugh v.* Beck, S. C. Penn., Nov. 1, 1886; 6 Atl. 923.

17. JURY—*Questions of Fact — Indian Laws and Customs—Custom and Usage—Evidence—Indian Agent—Married Women.*— Evidence of the laws and customs of an Indian nation as to the right of an Indian woman, married to a white man, to hold property in her own right, which she had before marriage, is properly submitted to the jury for their consideration, and it is not for the court to determine the law from such evidence, and lay it down to the jury. The evidence of an Indian agent as to the existence, nature, and universality of an Indian custom affecting the rights of married women under the Indian laws, is properly submitted, and it is no objection to such evidence that the witness is not a lawyer.—*Wear v. Sanger*, S. C. Mo., Dec. 20, 1886; 2 S. W. Rep. 307.

18. INSANITY—*Insane Persons—Action by Daughter Against Her Mother's Estate to Recover for Services—Evidence—Implied Contract — Services by Child to Insane Parent—Liability of Parent's Estate—Suit after Guardianship has Terminated.* —Where, in an action brought by a daughter against the administrator of the estate of her deceased mother, to recover for care, nursing, and attention alleged to have been rendered by her to her mother while she was insane, the defendant offered in evidence an order of the county court, which court had jurisdiction over the property of insane persons, appointing one M guardian of the mother, and also the settement of said M as her guardian, for the purpose of showing that the mother had been cared for by her guardian, *held*, that said order was not competent to go to the jury to affect the implied contract between plaintiff and her mother for compensation for her services, but it might go to the jury for the purpose of showing that M had authority to, and did furnish, as *de facto* guardian, the mother with necessaries. Where an action is brought by a child against the administrator of the estate of a mother to recover for services rendered and for necessaries furnished her during her insanity, while under the Missouri statute all express contracts by the insane are prohibited, their estate may be held liable, when the law implies one for services and necessaries rendered and furnished in good faith, and under circumstances justifying them. The fact that a plaintiff might have brought a suit against the guardian of an insane person, if such guardian has been appointed as provided by statute, cannot affect the right to sue the administrator, when the guardianship was terminated on the death of the insane.—*Reando v. Mosplay*, S. C. Mo., Dec. 6, 1886; 2 S. W. Rep. 405.

19. INSURANCE — *Fire Insurance — Application by Letter Unstamped—Notice after Fire Begins—Contract—Authority of Agent to Ratify after Loss—Certificate—Action—Evidence—Agreement to Divide Insurance with Other Companies.*— Where there was an agreement between the agent of the insurance company and the insured that, if he desired additional insurance after night-time, he should post a letter to the agent, asking for such insurance, and that the insurance should take effect for the amount named in the letter from the time it was posted, *held*, that such a letter deposited in the post-office unstamped is not posted so as to effect insurance, unles the plaintiff notified the agent of the depositing of the letter and of its contents before the loss; and such notice, given after the fire began, the plaintiff knowing at the time that the property was on fire, is not sufficient. If no binding contract of insurance is made up to the time of loss, the agent of the insurance company has no authority to ratify an attempted contract, and issue a certificate of insurance after the loss occurs. It is for the jury to determine from the evidence whether a sufficient contract had been made; and, if there had been, a certificate of insurance is not necessary to make the company liable. The agent with whom the plaintiff attempted to effect additional insurance, being a sub-agent of the defendant, acting under another agent at the same place, and there being an agreement between the agent and the sub-agent that such additional insurance, when applied for, should be divided among the defendant and two other companies, for which the principal agent was also acting, evidence offered by plaintiff tending to show why one of the other companies was not given part of the insurance in question was properly excluded, as the defendant's liability was not made to depend on the con-

tract between the agents.—*Blake v. Hamburg-Bremen Fire Ins. Co.*, S. C. Tex., Dec. 17, 1886; 2 S. W. Rep. 368.

20. ——— ——— *Incumbrance — Several Tracts of Land—Judgment—Homestead—False Answers in Application—Age of House Insured—House Vacant—Owner Preparing to Move in.*—A owned a farm consisting of the northeast quarter of a certain section of land, and 160 acres in the section that adjoined the first section. On the southwest quarter of the northwest quarter of the first section was a house, on which he held an insurance policy, containing a clause against incumbrances. There was no mortgage on the tract on which the house was situated, but there was a mortgage on the adjoining land. The application and policy described the property insured as being situated on the northwest quarter of section 29, and the southeast quarter of section 30, range 8, etc. *Held*, that the existence of the mortgage did not vitiate the policy. Where property insured is the homestead of the assured, the docketing of a judgment against him after issuance of the policy will not vitiate it. When the application for insurance states that the house insured was built in 1870, and it is proven that it was built in 1862, such erroneous statement will not defeat the policy, where the house is worth more than double the amount insured at the time of its loss, and the mistake could not in any manner affect the risk. Where a house that has been rented has been vacated by the tenant, and the owner, intending to occupy it himself, takes possession the next day, has it papered and painted, moves his furniture, etc., into it, keeps his employees in and about the house from six in the morning till seven or eight in the evening, prepared it for occupancy, and, the day before he expects to move in, the house is destroyed by fire, it will not be considered as vacant, within the meaning of a policy declaring that the insurer shall not be liable for any loss or damage occurring while the insured property is vacant or unoccupied.—*Eddy v. Hawkeye Ins. Co.*, S. C. Iowa, Dec. 21, 1886; 30 N. W. Rep. 808.

21. ——— *Life Insurance — Suicide — Evidence — Statement in Proofs—Accidental Killing.*—In an action on a life insurance policy, if there be a doubt whether the death of the insured was the result of accident or of suicide, the doubt should be solved in favor of the theory of accident; but if plaintiff has, in her proof of death, stated that the death was by suicide, it is incumbent on her to satisfy the jury that she was mistaken in this statement, and that the death was caused by accident. A condition in a life insurance policy that it will be void if the insured shall die by suicide, whether the act be voluntary or involuntary, does not apply where the death is the result of accident, or unintentional self-killing.—*Kells v. Mutual, etc. Life Ass'n.*, U. S. C. C. of S. Car., Dec. 3, 1886, 29 Fed. Rep. 196.

22. JUDGMENT—*Evidence of Debt as to Stranger—Fraudulent Conveyance — Rights of Grantee to Crops as Against Creditors.* — As against a stranger to it, a judgment is no evidence of the prior existence of the debt for which it was rendered. A fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the conveyance is unimpeached, unless it be shown that he manages the farm, and raises the crops, for the benefit of the grantor.—*Hartman v. Weiland*, S. C. Minn., Dec. 18, 1886; 30 N. W. Rep. 815.

23. LANDLORD AND TENANT.—It is competent for a landlord and tenant to vary the contract for rent, and the use and occupation by the tenant under the modified contract makes a good consideration for it.—*Hanson v. Hellen*, S. C. Me., Nov. 30, 1886; 3 N. Eng. Rep. 229.

24. LIBEL — *Measure of Damages — Mitigating Circumstances — Expenses — Injury to Feelings — Exemplary Damages — Province of Jury.* — Where a man has to appear in court as plaintiff in a libel suit to vindicate himself against a charge reflecting on his personal or official character, he is only entitled, if there are mitigating circumstances, and not express malice, to such damages as will compensate him and make him whole. In such cases the plaintiff's expenses, and the outrage to his feelings may be considered. The fact that the publication, though false, was an honest effort to repel an accusation made by the plaintiff against the defendant, is a mitigating circumstance. Where a libelous publication is made through spite, personal ill-will, or malice, exemplary damages may be allowed as a warning, and as a punishment for the offense. It is the exclusive province of the jury to determine the amount of exemplary damages which should be allowed.—*Shattuc v. McArthur*, U. S. C. C., E. D. Mo., Oct. 1, 1886; 29 Fed. Rep. 136.

25. MORTGAGE—*Merger—Equity — Presumption.*— Where a greater and a less estate meet in the same person, a merger does not necessarily follow; that will depend upon the intent and the interest of the parties; and if a court perceives it is necessary to the ends of justice that the two estates should be kept alive, it will so treat them. Thus, if a mortgage is the oldest lien, and is for an amount exceeding the value of the premises, and the mortgagee, to avoid the expense of foreclosure, takes a conveyance from the mortgagor, a court of equity would not permit the mortgaged premises to be swept away from him by a junior mortgagee. It is presumed, as matter of law, that the mortgagee, also grantee of the premises, must have intended to keep on foot his mortgage title when that was essential to his security against an intervening title, or for other purposes of security; and this presumption applies although the parties, through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes.—*Lowman v. Lowman*, S. C. Ill., Nov. 13, 1886; 6 West. Rep. 689.

26. PARTITION — *Deed — Covenant of Warranty—Title.*—Deeds of partition passing between two tenants in common convey no title, but simply define the boundaries of the land owned by each; and, where one of the parties has no title to the premises, the deed of the other to him is without consideration and void, and a covenant of warranty therein contained inoperative.—*Davis v. Agnew*, S. C. Tex., Dec. 21, 1886; 2 S. W. Rep. 370.

27. PHYSICIAN AND SURGEON—*Surgical Services—*

Implied Promise — Quantum Meruit. — Where a consulting physician renders medical and surgical services to a patient with his consent, and without objection or notice that such services are to be paid for by the attending physician, the law raises an implied promise on the part of the patient to pay him what the services are reasonably worth; and to overcome such promise, where a different arrangement was claimed to have been made for the payment of such services, it must be proved by satisfactory evidence that the physician knew of it, and either expressly or impliedly assented to it.—*Garrey v. Stadler*, S. C. Wis., Dec. 14, 1886; 30 N. W. Rep. 787.

28. PLEADING—*Mandamus Answer—Sufficiency.*—In considering a demurrer, regard must be had to all the pleading and not merely to that part of them to which the demurrer refers. In considering the sufficiency of a demurrer to an answer filed to an alternative *mandamus*, the writ which follows the petition must be reviewed in order to reach a correct result. Certainty to a common intent is the rule, and applies as well to the answer as to the petition for a *mandamus*, and the answer is sufficient if, without ambiguity or evasion, it responds to and denies the assertions of the petition. A petition for a *mandamus* on a telephone company, to put up a telephone at petitioner's mill, averred an offer to pay the usual rental charged by the company for telephones at the same distance from the central office, to-wit, $84 per annum, and respondent's refusal and demand of a higher rental, to wit, $150 per annum. The answer averred that the respondent charged various sums, depending on the service rendered, distance from the central office, and cost of erection and maintenance, and replied that the rental of $84 per annum only applied to telephones within one-half mile of the central office, and that the rate fixed for telephones at the same distance as petitioner's, or one and one-half miles from the central office, was $150, the amount demanded of petitioner. *Held*, that the answer is responsive and sufficiently explicit.—*Central, etc. Co. v. Commonwealth*, S. C. Penn., Jan. 3, 1887; 17 Pitts. L. J. (N. S.) 231.

29. POWERS — *Testamentary — Executors — Sale—Construction of Will.*—A testator ordered his executors to sell all his real estate, not disposed of by his will, at either public or private sale, "such sale or sales to be made in one year after my decease, or sooner if deemed desirable by them." *Held*, that the rule of construction of such powers is that the limitation is directory merely, unless it appears from the will that the testator intended that it should be of the essence of power; that, in the above will, executors can give good title if sale be made after the expiration of the year.—*Marsh v. Love*, Court of Chancery of New Jersey, Dec. 9, 1886; 6 Atl. Rep. 689.

30. PROMISSORY NOTES—*Consideration — Indorsement after Maturity—Evidence—Burden of Proof —Allowance of Time—Goods Furnished Another —Compromise—Courts—Jurisdiction— U. S. Circuit Courts—Collateral Security—Rev. St. U. S., § 629.*—A negotiable note, without consideration, cannot be enforced by a party to whom it is indorsed after maturity by the payee. A negotiable note imports consideration, and, in a suit on such an instrument, the burden of proving lack of consideration is upon the defendant. The allowance of time in which to pay a debt is a valuable consideration. Goods furnished a third party at the maker's request are a good consideration for a note given in payment therefor. Where a note is given by way of compromise of a disputed claim, the consideration will not be inquired into. Where a note for over $500, made by a resident of Missouri, and payable to another resident of that State, was indorsed by the payee to a resident of Illinois, to secure a debt for less than $500, and the indorsee agreed to account for and pay over to the indorser the entire amount collected on the note over and above the amount due him, *held*, in a suit on the note by the indorsee, that the circuit court had jurisdiction.—*Lipsmeier v. Vehslage*, U. S. C. C., E. D. Mo. Oct. 6, 1886; 29 Fed. Rep. 175.

31. TRADE-MARKS—*Infringement—"Chatter Book" —"Chatter Box."*— The name "Chatter-book," printed upon the cover of the defendants' books of the juvenile character of the general appearance of the complainants' books, being in the opinion of the court an imitation of the name "Chatter-box," which, by association, when used upon books of a juvenile character, points "distinctly to the origin or ownership" of the books to which it is applied, an injunction *pendente lite* is granted against its use.—*Estes v. Leslie*, U. S. C. C., E. D. N. Y., Nov. 20, 1886; 29 Fed. Rep. 91.

32. TROVER AND CONVERSION—*Action to Recover Damages — Pleading — Complaint — Joinder of Actions—Rev. St. Ind. 1881, § 278—Sale—Conditional—Innocent Purchaser—Liability for Conversion.*—In an action to recover damages for the unlawful and wrongful conversion of personal property, where possession is not sought, the complaint need not aver that the plaintiff is entitled to possession. Under section 278, Rev. St. Ind. 1881, a paragraph of complaint to recover damages for conversion of personal property may be joined with another paragraph to recover the possession of the same property. Where one to whom a conditional sale of personal property has been made sells it to a third person without the knowledge, or consent of the vendor, such third person acquires no better title as against the original vendor than the first purchaser had and may be held liable to him for conversion.—*Baals v. Stewart*, S. C. Ind., Dec. 11, 1886; 9 N. E. Rep. 403.

33. TRUSTS—*Employment of Counsel — Compensation of—Defaulting Trustee.*—It is the duty of a trustee against whom legal proceedings have been instituted to employ counsel, and, as incident thereto, to appropriate so much of the trust-estate as is necessary to reasonably compensate him for his services; and even where the trustee absconds, and so loses his right to an allowance for services and counsel fees, as between the trust-estate and himself, the counsel employed by him has a right of action against the *cestui que trust*, to whose estate the counsel has rendered necessary and beneficial services.—*Manderson's Appeal*, S. C. Penn., Oct. 4. 1886; 6 Atl. Rep. 895.

34. ——— *Resulting—Title in Part-Owner—Mortgage—Notice to Agent—Secret Trust — Estoppel —By Judgment — Requisites—Ejectment—Partition — Trial — Binding Instructions, Effect of —*

Presumption of Truth of Other Party's Evidence.—Where land is about to be sold under partition proceedings, and one of the heirs entitled agrees with the prospective purchaser thereof to allow her interest to remain in the land, and, in pursuance of this agreement, the purchaser takes the property, and the heir gives a receipt for her share of the purchase money, without receiving the same, a trust results in favor of such heir, to the extent of her interest in the land. When real estate is held by a title regular on its face, a *bona fide* mortgagee thereof, or one claiming under such mortgagee, is not liable to be affected by any secret trust or equity if he be without notice thereof. But, if the agent of the person holding such secret trust or equity gives actual notice thereof to the agent of the mortgagee (an attorney examining the title) prior to the execution of the mortgage, the mortgagee is bound thereby, and takes subject to such trust. Where one holding an estate in land brings an action for partition against those claiming adversely, such person is not thereby precluded, by the dismissal of her bill, from bringing ejectment against the same persons for the same estate. Where binding instructions are given the jury to find for the plaintiff, the supreme court will assume that the evidence adduced by the defendant is true, and that every fact which may be fairly inferred thereform is also true.—*Bigley v. Jones*, S. C. Penn., Nov. 8, 1886; 7 Atl. Rep. 54.

35. VENDOR AND VENDEE—*Contract for Sale—Rescission—Conditional Agreement to Reconvey—Non-User—Equity—Fraud—Rescission of Contract—Laches,*—Plaintiffs entered into an agreement to sell to defendant, an iron company, the iron ore in such of their lands as should be designated on a survey to be made by defendant as containing ore, and to convey the ore in the lands so designated to defendant. At the same time defendant agreed with plaintiffs to test and try the same before the end of the year, and when the test should have been made, if defendant could or or would not mine or use the same, that it would, on the demand of plaintiffs and repayment of the purchase money, reconvey to them the ore. Defendant afterwards paid the purchase price per acre agreed upon, and took conveyances from plaintiffs of the ore in certain of their lands. After ten years plaintiffs tendered the original purchase money paid them, and demanded a reconveyance under the agreement by reason of the failure of defendant to test or try the ore, as agreed in said contract, or to carry out the other conditions agreed to by them. *Held*, plaintiffs have no right, under defendant's agreement, to demand a reconveyance of the property on the ground of the non-user of the mine, in view of defendant's assertion that it can and will mine and use the ore when it needs it, of which it must be deemed the judge. Where plaintiffs claimed rescission of a contract for the sale by them of lands made ten years before, and a reconveyance of the lands conveyed in pursuance thereof, on the grounds of inadequacy of consideration and of fraud, in that the defendant procured the sale through false representations and promises which were not fulfilled: *held*, that the court, not being satisfied with the evidence of fraud and inadequacy of consideration, and finding no satisfactory explanation for the delay by plaintiffs in enforcing their alleged rights, would refuse the relief prayed for.—*Barnard v. Roane, etc. Co.*, S. C. Tenn., Oct. 12, 1886; 2 S. W. Rep. 21.

36. ——*Oral Agreement for Exchange of Lands—Obligations of Grantee of One Party—Trusts—Statute of Limitations—Vendee in Possession.*—In 1875, A and B orally agreed upon an exchange of lands. Possession was taken by each under the contract, and it was agreed that deeds should be given when B, who had only a swamp-land certificate for his land, should obtain a patent. In 1881, A conveyed all his property, including the land so sold, to his wife, who agreed to carry out the contract made with B. About the time of this conveyance B paid the balance due upon the price of the swamp-land, but did not then take out a patent. In January, 1883, A's wife brought an action against B to recover the land in the latter's possession under the contract. She had meanwhile filed a homestead upon it. B had made improvements thereon without objection being made by A or his wife. The wife, since A's death, had been in possession of the swamp land. *Held*, that plaintiff held the title impressed with a trust in favor of B: and that the latter having obtained a patent soon after the beginning of the action, and tendered a deed to plaintiff, he was entitled, under a cross-complaint praying for such relief, to a performance of the contract by her. The statute of limitations will not run against a vendee in possession of lands agreed to be sold, as he is to be regarded as a *cestui que trust*.—*Gilbert v. Sleeper*, S. C. Cal., Nov. 23, 1886, 12 Pac. Rep. 172.

37. ——*Vendor's Lien—Purchase Note.*—Where land has been conveyed to purchasers under an agreement by which they are to give the vendor, in payment for the same, a good, negotiable, bankable promissory note, to be signed by persons of sufficient responsibility to enable plaintiff to cash the same, and the purchasers, after receiving the conveyance, give their own note which is not negotiable nor collectable, the court will enforce a lien for the purchase money upon said land in favor of the vendor.—*Gee v. McMillan*, S. C. Oreg., Dec. 7, 1886; 12 Pac. Rep. 417.

38. WAYS—*Establishment of—Common Law—Obstruction—Establishment by Prescription and Use—Knowledge of Owner—Dedication—Use—Presumption—Obstruction—Indictment—Evidence—Defense—Proceedings in Laying Out Road—Mansf. Dig. Ark. § 5927, et seq.*—The Arkansas statutes in regard to highways do not negative rights which may have been previously or subsequently acquired by the public, and they should not be construed as doing away with the modes of establishing the existence of public roads recognized by the common law, or of abolishing the common-law procedure against one for placing obstruction in them of such a character as to be a common or public nuisance. Where the public, with the knowledge of the owner, has claimed and continuously exercised the right of using land for a public highway, for a period equal to that fixed by the statute for bringing actions of ejectment, their right to the highway, as against such owner, is complete; there being no proof that the road was so used by leave, favor, or mistake. The dedication of a public highway may be presumed from use, notwithstanding the public travel may have deviated at points from the old route. In an in

dictment for obstructing a public highway, the orders and judgment of the court establishing the same are admissible in evidence against the defendants, though they contain no provision for compensation, or mention of assessment of damages, to the land-owners over whose land the proposed route lay. The omission, in proceedings to establish a public highway, to give the land-owners or their agents personal notice of the time and place of the viewers' meeting, under Mansf. Dig. Ark. § 5927, *et seq.*, affords no defense to one indicted for obstructing the road.—*Howard v. State*, S. C. Ark., Nov. 20, 1886; 2 S. W. Rep. 331.

39. WILL — *Construction — "Class Doctrine" — Vested Interest—Children of Testator—Descent and Distribution.*—A testator made a will containing the following clause: "It is my will that my property be kept together, under the direction of my wife and my executors, * * * and * * * that my children be as thoroughly educated as circumstances will admit of, and, as they marry off, give each a decent outfit, which shall be equal; and at the death of my beloved wife, the property to be equally divided between my children." *Held*, in a suit involving the construction of this portion of the will, that the "class doctrine" does not apply, but that, under the will, there was a vested interest passing to the children of the testator, at the time of his death; and that, upon the death of a married daughter, her interest passed to her only child, under the Tennessee statutes of descent and distribution.—*Owens v. Dunn*, S. C. Tenn., Oct. 17, 1886; 2 S. W. Rep. 29.

40. —— *Election — Rule of Interpretation when Testator Owns Partial Interest, and Entirety Devised.*—In interpreting a will and ascertaining the intent of a testator, the court will act on the presumption that the intention was to charge that which belonged to him. When the testator owns a partial or future interest in the property devised, the established rule is, that the court will lean to that construction which shows an intention to give only the interest which belongs to him, and will require clear and unambiguous expression of an intent to devise the entire property, express or by manifest implication. To compel an election, it must satisfactorily appear that the testator attempted to dispose of what he did not own. If the expressions of the will are ambiguous or doubtful, and the court cannot determine that it was manifestly the intention to dispose of property not the testator's own, the *prima facie* presumption will prevail.—*Toney v. Spraggins*, S. C. Ala., Dec. Term, 1886.

41. WITNESS—*Contradicting — Collateral Matters —Impeachment—Charge of Crime.*—A witness in a suit for divorce, on cross-examination, was asked if he had not at one time committed larceny. Having denied it, *held*, that he could not be contradicted in regard thereto. A witness cannot be impeached by showing that he has been charged with and arrested for a crime.—*Pullen v. Pullen*, Ct. Ch. N. J., Dec. 9, 1886; 6 Atl. Rep. 887.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 4. A sells to a railroad company the right of way through his farm, and agrees to build fences on either side of the line of road. During the operation of the road, sparks from the locomotives of the road set fire to dry grass, and some improvements are burned up. Can A recover damages? Did he, in selling the right of way, release the railroad company in advance for damages caused by the operations of the road? Please cite authorities. PYRE.

ANSWERS.

Query No. 21. [23 Cent. L. J. 264.] A, a farmer, bequeathed to his widow, B, a life estate in his land; at her death the land itself to go to C, his illegitimate nephew, no proviso empowering B to sell the land if C died intestate first. C died seventeen years before B, who executed a deed and sold it, though she had merely a life estate. Properly the land would escheat to the government. If so, would the courts or president cause her deed to be cancelled and the estate sold for the benefit of the government? J. C. H.

Answer. In the absence of heirs, lands escheat to the various States, and not to the United States. When the land is unoccupied, it is considered in some States to vest in the State; in other States, and when it is occupied, the title in the State is perfected by legal proceedings called an inquest of office, or office found. 3 Washb. on Real Prop. (4th ed.) 47, 48, 49.

RECENT PUBLICATIONS.

LIFE OF EMERY A. STORRS.—His Wit and Eloquence as shown in a Notable Literary Political and Forensic Career. By Isaac E. Adams, Esq., under the direction of Mrs. Storrs. Hubbard Brothers Publishers. Philadelphia, Boston, Cincinnati, Kansas City, Atlanta. G. L. Howe, Publisher, Chicago. 1886.

We owe no apology to our readers for a deviation from the line of our duty as legal journalists in commenting upon a literary work so emphatically germane to the profession as the biography of a distinguished lawyer, orator, and advocate. It is no deviation. On the contrary it is strictly in the line of our duty, and it is a duty which is also a privilege to pay our tribute, in this humble fashion, to the memory of a man who, by his genius and eloquence, shed so much lustre upon the legal profession as Emery A. Storrs.

The work before us, which is a large and very handsome volume of nearly 800 pages, is replete with interest, containing, besides the customary biographical matter, extracts from Mr. Storrs' speeches and writings, both forensic and political. The latter, although in a great measure they relate to bygone crises and what are called in political parlance "dead issues," will, nevertheless, be read with interest, because of the force and eloquence with which the gifted orator expressed and enforced his views; the former, which are more directly and appropriately within the

scope of our consideration are, irrespective of all changes in political parties or public affairs, worthy of preservation as exponents of the highest art of the advocate, the orator and the dialectician.

Mr. Storrs' professional life was very active, and included every branch of the profession usual among American lawyers of the higher grade; not only did he excel in the impassioned oratory appropriate to cases which involve life, liberty, character and feeling, but in no less degree was he at home in the domain of pure and cold reason, the discussion of abstract legal questions. In the volume under consideration will be found profuse illustrations of his mastery in every branch of the profession which he adorned. The author of this biography has rendered to the profession a service worthy of grateful appreciation in thus collating the works of one so gifted and distinguished.

A TREATISE ON THE LIMITATIONS OF POLICE POWER, in the United States considered from both a Civil and a Criminal Standpoint. By Christopher G. Tiedeman, A. M. LL. B., Professor of Law in the University of Missouri, Author of a Treatise on Real Property. St. Louis: The F. H. Thomas Law Book Co., 1886.

It is the object of this work to set forth systematically and in detail the limitations imposed by the constitutions, respectively of the United States and of the States, upon the exercise by congress and the State legislatures of that vague and indefinite power usually denominated the "police power." The author is manifestly predisposed to confine its exercise within narrow limits. In his preface he says: "The police power of the government is shown to be confined to the detailed enforcement of the legal maxim, *sic utere tuo ut alienum non lædas*. Assuming this to be true, that this maxim embodies the whole law on the subject of police power, the very existence of this volume demonstrates the futility of efforts to condense into a single sentence a whole system of law. Everything depends upon the construction, strict or liberal, narrow or broad, which, under certain given circumstances, is to be placed upon that sentence. The elucidation of these several constructions and of the degree and manner of application of the text to varying subjects and circumstances, is the purpose to which the author has devoted his talents and labor in this volume.

He has produced a work of much interest and value, covering many topics of great importance. His first chapter is preliminary and explanatory, the second treats of police regulation of personal security, in which are included not only mere security of person from violence, but of health and reputation. And in this connection is shown how far the preservation of the right of personal security may be properly affected by the interposition of government.

In like manner in the third chapter the right of personal liberty is considered, and in the fourth the police control of criminal classes, and the limitations upon the powers of the State which the constitution guarantees, even in behalf of the most depraved. The fifth chapter treats of the control of dangerous persons, vagrants, lunatics, habitual criminals. In subsequent chapters are treated a great variety of other subjects, such as police control of morality and religion, the freedom of speech and of the press, the right to exercise trades and professions, marriage, and upon each topic the author seeks to show as distinctly as possible the restrictions and limitations which the constitution imposes upon the exercise of the police power by the legislature.

The book is well written and judiciously arranged, and is well worthy of a favorable reception by the profession. It is almost unnecessary to add, observing the name of the publishers, that the typographical execution, etc., is unexceptionable.

JETSAM AND FLOTSAM.

AN ambitious young lawyer, in assisting the State in a prosecution for seduction, got off the following: "Do you remember the great seduction case of the Bible? How David seduced and betrayed Hagar, the wife of Hezekiah? Ah, gentlemen, God forgot not David in the day of his wrath. He was right *after him*. For this one foul crime against virtue, the great king was translated in a chariot of fire, and when he had raised up his eyes in Dives, *the ravens came and picked his sores!*"

LAWYER A—"I've gained my case, old boy, and my client escapes the halter."

Lawyer B—"How did you do it?"

A—"Now you ask me a hard one. The case had been given to the jury, and they had been out a couple of hours, when they sent in a communication asking for instructions. It turned out that they only wanted to ask a very trifling, irrelevant question. They wished to know if the senior counsel for the defense, meaning me, was employed by the defendant or assigned by the government. They were told that I was engaged by the defendant. Well, they returned to their room, and, in less than three minutes, they again came into court with a verdict acquitting my client on the ground of insanity. I never was so surprised in my life."

WAY BACK IN 1860.—During an evening session of the February term of the supreme judicial court for Strafford county, in the year 1860, a young lawyer from a neighboring town, for want of something else to take up his attention, picked up from one of the tables an old report of the receipts and expenditures of the City of Dover, and, after spending some time in looking it over, wrote on its blank page as follows:

> What business has this old report
> In this supreme judicial court?
> For one must see in half a minute
> There's not a speck of law within it;
> Or word of proof, or yet denial
> Of any fact that's here on trial.
> We therefore move, without a doubt,
> That this report be carried out.

And, throwing the book back on the table, he passed out of the court room. Some one, seeing what he had written, replied as follows:

> The business that has brought it here,
> We freely own does not appear.
> But if it here cannot remain,
> Because the law it don't contain,
> Then many a lawyer, without a doubt,
> Should, with the book, be carried out.
